Area	Tension Point	Statutory (S) or Regulatory (R) Implications
1. Business model concerns.		
	a. Difference in business plans between government and industry.	Regulatory
	b. Commercial return on investment over years versus depot and competition requirements.	Regulatory
	c. For-profit model versus non-profit business model conflict.	Regulatory
	d. Government as customer versus Government as competitor (depot; labs).	Regulatory
2. Acquisition planning and requirements.		
	a. GPR: Scope, sunset, one size does not fit all paths to competition.	Regulatory
	b. Depot-level maintenance capability/requirements.	Regulatory
	c. Sustainment is more than maintenance	Regulatory
	d. What is necessary to comply with 2320(e)(3)'s requirement to address TD (and CS) needs in view of potential changes to sustainment strategy.	Regulatory
	e. Access for limited purposes (cyber review; airworthiness; approvals) versus delivery as a CDRL under DFARS.	Regulatory
	f. Software maintenance/sustainment requirements.	Regulatory
	g. CDRL requirements for fundamental research programs versus CDRL needs for production/sustainment.	Regulatory
	i. Loss of (sustainment) support	
3. Source selection concerns.		
	a. Data rights as an evaluation factor.	Statutory/Regulatory
	b. IP valuation versus evaluation factors and priced CLINs.	Regulatory
	c. Bid protest versus need to evaluate legality/business case for IP terms in proposals.	Regulatory
	d. Need for Government flexibility to use existing tools versus need for legal review of H clauses and evaluation criterion (versus 10 U.S.C. 2320; versus CICA).	Regulatory
4. Balancing the interests of the parties.		
	a. Funding as proxy.	
	~~i. Mixed funding: restore pre-2012 statutory language~~	Statutory
	ii. Indirect cost pools are considered privately funded	
	iii. Treatment of IRAD versus SFRAD for IP rights determinations. 1. IRAD Risk correct for limited/restricted rights	
	iv. Funding test for rights: is it the correct test or is there a less complex alternative?	
	v. Commercial items vs noncommercial items	Regulatory
	b. Rights in relation to needs.	
	i. Commercial software terms versus Government-unique requirements.	Regulatory
	ii. Authorized release and use of limited rights TD (two different points).	Statutory/Regulatory
	iii. Balance need for rights in IP versus need for competition.	Regulatory
	iv. Are existing rights sufficient for depot, or is there a need for depot-specific, service specific, and program specific licenses.	Statutory/Regulatory
5. Implementation concerns.		
	a. Software versus technical data.	Statutory
	b. Need to recognize differences between technical data and computer software versus need for simplified contracting.	Regulatory
	c. Development versus adaptation.	Regulatory
	d. Form, fit & function (vs. segregation/reintegration or interface) technical data; software documentation versus FFF.	
	e. OMIT versus detailed manufacturing and process data (DMPD).	Statutory
	f. Rigid IP requirements versus need for flexible arrangements.	Regulatory
	g. Poor DID alignment with statutory/regulatory categories (FFF, OMIT, etc.).	Regulatory
	h. 10 U.S.C. 2321 protections versus complexity too high to get meaningful case law. (Link to source of funding alternatives)	Statutory
	i. Embedded software (the object code) versus source code (human-readable) and software design documentation (the data used to produce the object code).	Statutory
	j. Mandatory flow-down (commercial subs and suppliers).	Regulatory

	k. Segregation "at the clause level"—applying non-commercial clauses to commercial TD/CS.	Regulatory
6. Compliance/Administrative concerns.		
	a. How to keep CDRL deliverable up-to-date.	Regulatory
	b. Small Business Innovation Research (SBIR) – flow down to suppliers; inability to share with primes; how evaluated.	Regulatory
	c. Lack of trained personnel (e.g. IP strategy; draft SNLs; DFARS 227.7103-1; IP valuation; use of CDRLs related to data)	Statutory
	d. Data assertion list (7017) – burden on contractor to prepare/Government to receive versus benefit to Government; confusion over lists lead to contract delays.	Regulatory
7. Data Acquisition concerns.		
	a. Deferred ordering period: 6 years (rather than perpetual).	Statutory
	b. Time limits on [priced] contract options – generally 5 years, extendable to 10?	Regulatory
	c. Deferred Ordering Part 1: data "generated ~~or utilized~~" under the contract.	Statutory
	d. Deferred Ordering Part 2: all interface or major systems interface data may be ordered regardless of USG development funding.	Statutory
	e. Failure to define and order CDRLs/reliance on deferred ordering and DAL to obtain data (Already covered, possibly repetitive).	Regulatory
	f. Deferred delivery versus escrow.	Regulatory
8. Modular Open Systems Architectures (MOSA) concerns.		
	a. GPR in MSI even if DEPE and MSI developed with mixed funding.	Statutory
	b. GPR in interfaces developed with mixed funding.	Statutory
	c. Open interfaces versus preference for industry standards; standards maintenance.	Regulatory
9. Section 809 Panel Recommended Items		
Provide issue and why should be looking at it	a. Poor alignment between 10 U.S.C. 2320 and other markings (e.g., distribution statements), clauses (DFARS 252.204-7000), and contract attachments (DIDs; DAL).	Regulatory
	b. Complexity of the IP scheme versus ability of commercial and small businesses to comply (SEC 809)	Regulatory
	c. Synchronization of depot policies with data rights provisions	Regulatory

DRAFT

Government-Industry Advisory Panel
Tension Point Development

Original Title: *(1)(a) Difference in business plans between government and industry; (1)(b) Commercial return on investment over years versus depot and competition requirements; (1)(c) For-profit model versus non-profit business model conflict*

Authors: *Bill Elkington and Sean O'Brien*

Tension Point: There are fundamental conflicts within DoD's motivations regarding what it wants from industry, and because of industry's profit motives, there is a fundamental mismatch between what industry and DoD perceive their needs to be.

Issue: There is a fundamental conflict in DoD's motivation when it comes to innovative companies' IP. First, DoD wants to drive its costs lower and meet its needs for depot level capability through the acquisition of unusual IP rights. It sometimes tries to extract unusual (by commercial standards) IP rights in order to provide competition to companies that have invested in IP. The strategy sometimes is to try to take unusual IP rights and provide them to competitive product companies to lower the purchase price of the product. Or, even more frequently, it is to provide the innovative company's IP either to itself (in government operated depots), other aftermarket services providers, or other parts suppliers, and thereby reduce aftermarket program costs and meet other statutory requirements for depot work content. DoD program offices sometimes try to obtain these unusual rights at a price that is below the value of those rights by tying the IP transaction to a product purchase transaction.

In other words, DoD programs will sometimes attempt to achieve low cost and meet statutory depot requirements by tying the requirement for provision of unusual IP rights to a contract award for purchase of products or services, rather than relying solely on life-cycle-price competition from competing investing companies to drive cost down and rather than relying on public-private partnerships or other similar mechanisms to meet statutory depot requirements while providing reasonable aftermarket value to the investing company.

Second, DoD wants to encourage companies to invest in IP that matters to it and to make the fruits of that investment (in the form of innovative products and services) available to DoD. For most private sector companies, and as a matter of fiduciary duty for publicly traded companies, investment decisions are made based on the expected return on investment. In some industries relevant to the DoD's mission (e.g., aerospace), the return on investment often comes through aftermarket/sustainment activities rather than the initial original equipment sale. Therefore, over the long term, both traditional and non-traditional DoD suppliers will be less likely to make their innovation available to DoD, or continue to invest at current levels, or both, if their IP rights are made available to competitors, because to do so will typically destroy value. Providing an innovative company's IP to competing enterprises will usually reward non-investing companies and punish investing companies by providing sales and profits to non-investing companies, while reducing the risk-adjusted returns of the innovative companies; ultimately an investing company's enterprise value will diminish to the point that needed credit and investment is driven into avenues where the expected return on investment is greater.

Formatted: Highlight

Comment [RDH1]: The DoD has a constitutional obligation to provide for the Nation's defense. Congress has passed legislation e.g., the various Titles of United States Code and Federal Code of Regulations, and the DoD is duty bound to comply with the law. One such law is to maximize competition and it is recognized that there are specific exceptions to competition. So, yes one of the goals is to minimize the cost of goods and services. The DoD seeks to purchase goods and services specific to meeting warfighter needs. When we purchase equipment, we have to be prepared to operate it and sustain it over its life-cycle. Depot maintenance is not the only thing we are seeking data for.

Comment [RDH2]: If you define "unusual" as data that a commercial entity is unwilling to give to another commercial entity fine. If you define "unusual" as requesting data rights/licenses that Congress has established for the Federal Government then this should be rephrased.

Formatted: Highlight

Comment [RDH3]: The DoD 'requests' data and rights/licenses to that data we need to operate and sustain a product over its life cycle. We "evaluate" data rights/licenses to get best value. The use of the word "extract" implies a devious or underhanded intention that does not exist in the DoD.

Formatted: Highlight

Comment [RDH4]: The United States Congress and the President of the United States have passed law(s) that provide for certain rights to selected forms of data (call them default rights). The DoD requests data to meet the missions assigned by the President and we either ask for the default rights to that data or we negotiate for a different level of rights. One such law that the DoD must comply with is maximizing competition subject to the 7 exceptions. If the default data rights/licenses allo ...

Formatted: Highlight

Comment [RDH5]: The DoD seeks the data along with the associated rights/licenses to operate and sustain an item or software over its life cycle. Once again, Congress and the President have pas ...

Formatted: Highlight

Comment [RDH6]: I believe the authors need to review the history of legislative actions taken by Congress and the President relative to organic depot level maintenance. The so called 50/50 rule and ...

Comment [RDH7]: I shudder to think that we are trying to rewrite 10 USC 2320 and 2321 around a particular industry, e.g. aviation. The DoD has an enormous number of equipment and software th ...

Comment [RDH8]: I'm sorry, but I thought our mission was to find a balance between the legitimate interests of both industry and the DoD, but you aren't even recognizing in this white pap ...

DRAFT

Government-Industry Advisory Panel
Tension Point Development

The issue is this: In view of private sector business models, the DoD's use of tying tactics and monopoly power may provide DoD with unusual IP rights in the short term, which enables DoD to reduce its costs for some period of time and meet its statutory depot requirements, but over the long term, such a strategy will drive away the very companies DoD looks to for innovation. Alternatively, if DoD only sought unusual (by commercial standards) IP rights in the areas it actually needs and were willing to fully compensate the IP investing company for the value of those rights (and budget for the purchase of those rights), it would encourage traditional and non-traditional suppliers to make investments in IP it cares about, over the long term.

Recommendation: Make changes to the DFARS that would require:

1. DoD acquisition of rights to privately funded and commercial IP—outside of the implied license rights purchased in the products and services offered for sale, themselves—shall be done in such a way that DoD pays full value for those rights.
2. The valuation of such unusual rights shall be assessed in accordance with best practices and industry standards and norms by experts in the field of IP valuation.
3. DoD shall only acquire rights to privately funded and commercial IP that it actually needs to perform its mission.
4. If DoD uses the cost of obtaining rights to privately funded and commercial IP to disadvantage a bidder in a procurement, it must show to a panel of IP valuation and financial analysis experts that its preferred solution would be less expensive than the disadvantaged bidder's solution over the product's life cycle.

Cross-reference to other Tension Points:

- **Section 3 (Source Selection Concerns), Subsection b.**
-

Comment [RDH9]: Is this an issue or a plea? Industry has known the statutory constraints of doing business with the Federal Government and DoD for some time. It's not like all of a sudden we changed how we do business. The DoD operates within the confines of the DFARS in acquisition. Changes to the DFARS are open for public comment and rule making. These so called tactics and monopoly power are no different than they have ever been. You are attempting to use your IP as a forcing function to hold the DoD hostage to your prices and you leverage in bargaining/negotiation.

Comment [RDH10]: As determined by who?

Formatted: Highlight

Comment [RDH11]: Current policy already states that we are to acquire the minimum data necessary to perform our mission.

Formatted: Highlight

Comment [RDH12]: Are you really suggesting that the DoD allow a panel of IP valuation and financial experts to inform the decision making of the Source Selection Authority or the Milestone Decision Authority?

DRAFT
Government-Industry Advisory Panel
Tension Point Development

Original Title: *(2) (g) CDRL requirements for fundamental research programs versus CDRL needs for production/sustainment.*
Authors: *James McEwen, Roger Hamerlinck*

Tension Point: Standard DFARS data rights and CDRLs are in appropriate for IP for research contracts

Issue:

The Panel received some comments on whether the same data rights clauses used for production and sustainment are appropriate for fundamental research and development. Specifically, the current DFARS clauses for rights to technical data and computer software have the major parts which are inapplicable for situations where the developed parts or code would never be directly put into production, competed or maintained. In these contracts, the results are interim and final reports demonstrating whether the research is promising. The designation did not indicate a definition for what defines fundamental research and development, although it is noted that the Department defines research and development as being Technology Readiness Levels (TRLs). These are characteristics of a TRL of 6 or less.

Further, research institutions, small companies, and non-profits that should be approached to perform research work for the Government do not have staff members sophisticated in intellectual property matters, leading to potential compliance problems with the existing structure. There is at least one Federal Circuit case identified where the contractor claimed confusion over technical data reporting and reporting required for the patent rights clause which led to the loss of ownership of the patent, although the court found the defense unconvincing.

The Panel received testimony that DoD research entities using Other Transaction authority were able to use simplified Data Rights clauses which research institutions largely did not reject or negotiate. The guidance in the DoD Grant and Agreement Regulations also provides guidance on minimal data rights requirements in a research contract.

Government members did note that the Government does need to at least document development of technology under these research agreements where the technology is being reused in production contractors. Therefore, to the extent that a large technical data package is ordered, it is used for archival purposes as opposed to downstream maintenance of any items or software developed under a research contract. In this sense, the need for a technical data package is more consistent with the Patent Rights reporting requirements of subject inventions under FAR 52.227-11 or DFARS 252.227-7038 since both reporting requirements document government involvement in development of technology.

Recommendation:

Comment [RDH1]: Jim
You need to be more specific about what categories of Research Development Test & Evaluation (RDT&E) you are talking about.
Budget Activity 1, Basic Research
Budget Activity 2, Applied Research
Budget Activity 3, Advanced Technology Development (ATD)
Budget Activity 4, Advanced Component Development and Prototypes (ACD&P)
Budget Activity 5, System Development & Demonstration (SDD)

Comment [RDH2]: Jim
You need to understand how RDT&E BA1-3 function compared to the Acquisition Process Model.

Comment [RDH3]: This is an example of mixing the two models up. What is fundamental research and development to you? What you describe in this last sentenc

Comment [JGM4]: The comment seemed to be directed to TRLs. If the RTE&E is a better model, that may be a useful description.

Comment [RDH5]: Jim – we already work with universities, small business firms, etc. in basic and applied research. We fund the

Comment [RDH6]: In most cases, OTAs are used in basic and applied research, whereas the types of contracts, incentives, clauses, etc. are used in acquisition program contracts.

Comment [RDH7]: Again, this is mainly for basic and applied research activities.

Comment [RDH8]: Here you have changed topics/models without so noting. The entire process of going through the acquisition program life cycle model leads to productio

Comment [RDH9]: I don't think it is necessary to use an adjective such as large, medium or small here. A TDP is a TDP

Comment [RDH10]: Jim, this isn't true in all cases. As I said previously, the entire process of going from MDD through MS C is focused on producing and sustaining a capability. Se

Comment [RDH11]: The TDP and object/source code document the design which provides a desired capability. Why would we pay, in whole or in part, to develo

Comment [RDH12]: I'm not an attorney such as yourself and I definitely do not have the training you possess in patents, but the TDP for an end item documents the

DRAFT

Government-Industry Advisory Panel
Tension Point Development

The Panel does not recommend any statutory changes to 10 U.S.C. 2320 or 2321.

The Panel does recommend the DAR Council consider a streamlined data rights clause to simplify the requirements consistent with the minimum requirements included in Other Transactions and the guidance in the DoD Grant and Agreement Regulations, and ensure such clauses include the ability to agree to Specifically Negotiated Licenses to tailor the clauses when used in research contracts to attract the most research institutions to compete for research contracts. Where used, such clauses should be used instead of DFARS 252.227-7013, 252.227-7014, or 252.227-7015 such that a single clause governs data rights for the research contract.

The Panel further recommends that DoD 5010-12M and associated Data Item Descriptions be changed to ensure research data requirements include a mechanism for archiving technology development for Technology Readiness Levels of 6 or less, including listing of technologies developed at the lowest practicable and segregable level. The Panel suggests that such requirements could be accomplished while simultaneously forcing compliance with FAR 52.227-11 and DFARS 252.227-7038 is the requirements incorporated the subject invention reporting requirements into the formal CDRLs to help document technology concepts developed with Government funding such that a contractor who submits an interim or final research report is also complying with the patent reporting requirements in FAR 52.227-11 and DFARS 252.227-7038.

Cross-reference to other Tension Points:

- 5c. Development versus adaptation.
- 5g. Poor DID alignment with statutory/regulatory categories (FFF, OMIT, etc.).
- 5k. Segregation “at the clause level”—applying non-commercial clauses to commercial TD/CS.
- 6c. Lack of trained personnel (e.g. IP strategy; draft SNLs; DFARS 227.7103-1; IP valuation; use of CDRLs related to data)
- 9b. Complexity of the IP scheme versus ability of commercial and small businesses to comply (SEC 809)

Comment [RDH13]: Is your recommendation to use OTAs in place of the standard contract types for everything? Or only where appropriate, which is a judgement call on the part of the Government.

Comment [RDH14]: This does not apply to acquisition programs as it might to basic and applied research.

Comment [RDH15]: I repeat my earlier comment about mixing apples and oranges. You need to specify.

Comment [RDH16]: Jim – since the Government does fund some basic and applied research activities we do have a legitimate interest in the resulting IP. Under an acquisition program contract, the Government funds, wholly or in part the resulting designs/products.

Comment [RDH17]: You are going to have to be much more specific about what research data you are talking about.

Comment [RDH18]: Jim – A Data item Description (DID) identifies the name, format, and content of what the Government wants to have delivered. The CDRL is the contractual vehicle for ordering and having that data delivered. A single data deliverable could contain FFF, OMIT, Interface, and/or DMPD. To ask that the DID and/or CDRL specify whether the deliverable contains one or more of these types of data is not as simple as you might think.

Comment [RDH19]: Lastly, throughout the document you mix and match the two models as I have described them. You need to make it very clear what recommendations pertain to basic and applied research and which ones pertain to an acquisition program.

DRAFT

Government-Industry Advisory Panel
Tension Point Development

Original Title: *(3)(a) Data Rights as an Evaluation Factor*

Author: *Charles Harris*

Tension Point: Source selections in the past often failed to include an evaluation factor for technical data/technical data rights, so the value of intellectual property in an innovative industry proposal was overlooked or not used to discriminate among proposals. A recent trend in source selections is to include provisions seeking a certain level of data rights, e.g., Government Purpose Rights, without no ability for industry to trade off a certain level of data rights for another benefit to the Government such as reduced cost of a commercial product or increased innovation in the proposed solution. Industry perceives these intellectual property evaluation factors as disadvantageous to innovative companies with robust technology investment programs. Industry has proposed that DoD be prohibited from evaluating a contractor's proposal based on the contractor's willingness to relinquish greater rights than the Government is entitled to under the law. In addition, industry has proposed that DoD be prohibited from requiring a listing of background inventions and patents that a contractor might use.

Issue: Source selections often fail to include an evaluation factor for technical data/technical data rights, so the value of intellectual property in innovative industry proposal is overlooked or not used to discriminate among proposals. In other source selections the quantity instead of quality of technical data/technical data rights is evaluated, which may result in 1) a more expensive solution in terms of total life cycle costs, and 2) a less innovative solution being selected instead of more innovative, commercial solutions that deliver less technical data and provide substantially greater cost savings over the acquisition life cycle.

The Department of Defense has failed to provide uniform source selection procedures for the evaluation of technical data/technical data rights. Department of Defense source selections should consistently communicate the Government's intellectual property requirements in clear, meaningful ways to encourage Industry to propose the best possible array of noncommercial and commercial solutions, allow the Government to make meaningful differentiations amongst those disparate proposals, and ensure that the award represents the best value to the Warfighter and the Nation.

Source selections should be carefully structured to avoid "double counting" the value of intellectual property. For instance, when intellectual property is addressed in the technical approach evaluation factor, it should not be evaluated under the cost evaluation factor unless some clearly articulated reason such as additional risk in technical approach is provided.

DoD should not adopt a "one size fits all" approach to intellectual property evaluation in source selections. Clear criteria to meaningfully discriminate between offers should be provided such as reduced cost and schedule of development from commercially available items or reduced sustainment costs when the Government receives sufficient technical data/technical data rights for organic sustainment.

Recommendation:

The Panel does not recommend any changes to 10 U.S.C. § 2321.

The Panel does recommend the following change to 10 U.S.C. § 2320(a)(2)(F):

"SOURCE SELECTION.— The Government shall evaluate a contractor's or subcontractor's (or a prospective contractor's or subcontractor's) offer to sell or license to the United States any technical data or computer software deliverables and associated license rights as part of its evaluation of an offeror's proposal. Such source selection evaluation may include additional factors such as royalty costs for use of patents and copyrights, which add acquisition life cycle costs. When doing so, the Government shall not require a contractor or subcontractor (or a prospective contractor or subcontractor) ~~may not be required~~, as a condition of being responsive to a solicitation or as a condition for the award of a contract—

(i) to sell or otherwise relinquish to the United States any rights in technical data or computer software except--

(I) rights in technical data or computer software described in subparagraph (A) for which a use or release restriction has been erroneously asserted by a contractor or subcontractor;
(II) rights in technical data or computer software described in subparagraph (C); or
(III) under the conditions described in subparagraph (D); or

(ii) to refrain from offering to use, or from using, an item or process to which the contractor is entitled to restrict rights in technical data or computer software under subparagraph (B)."

The Panel does recommend changes to Department of Defense Source Selection Procedures.

Cross-reference to other Tension Points:

- (3)(b) IP Valuation Versus Evaluation Factors and Priced CLINS

Original Title: *(3)(b) IP Valuation Versus Evaluation Factors and Priced CLINS*

Authors: *Bill Elkington and Richard Gray*

Tension Point: Fairness in assessments of competing companies in a procurement of products and services is central to DoD getting the best value for the American people; yet when a willingness to provide the government with unusual or broad, ownership-like rights to privately funded and commercial IP or willingness to provide the government with unusual but narrow rights in such IP is used to assess a company's proposal, it is sometimes not clear how that willingness itself and how the price of any such rights should bear upon the procurement decision.

Issue: It is completely understandable that DoD tries to obtain data rights in the initial phases of weapon system development for such purposes as reprocurement and sustainment. After all, DoD is motivated to get the best deal possible for the American people in defense procurements. If it can persuade companies who invest in innovative technology to relinquish commercially unusual rights to that technology, perhaps it should. On the other hand, when two or more bidders offer varying packages of IP and IP rights, what approach to evaluation of these varying IP and IP rights packages as part of the overall offer should be taken? Aside from discouraging commercial companies from doing business with the government, when the DoD uses data rights as an evaluation factor, is it even possible for the government to fairly assess the financial benefit of one bidder's proposed package of IP and IP rights versus another's often different package of IP and IP rights?

There are no standards today for how such a willingness and how priced rights of this kind should be used in making an acquisition decision. How does the procurement authority know, for example, whether one bidder's offer, with a 100-item-long data item assertion list, is more or less financially beneficial to the government than another bidder's offer with a 10-item-long data item assertion list? One's intuition may be that the bidder who reserves fewer rights to itself and its subcontractors and suppliers should be favored. But perhaps the bidder with the much longer list has been much more thorough in the construction of the list. How is the procurement authority to know for sure that both bidders' data rights assertion lists have been prepared with the same level of care, thoroughness, and diligence?

Or perhaps the bidder with the much longer data item assertion list may have much higher commercial content in its offer and therefore will be able to bid a lower development cost than the competing bidder, or perhaps because of its higher commercial content, the risk to its development may be considerably lower. In such a bid, perhaps the commercial companies involved may not be willing to furnish the IP and IP rights that would allow their competitors to get access to their technology for the purposes of reprocurement and certain activities in sustainment. If this is the case, would the life cycle cost of the weapon system with much higher commercial IP content and IP content developed a private expense be higher or lower

than the competitive bid with much higher IP content coming from other DoD contractual efforts? Is it clear what the components and methods of such an analysis should be?

One rationale for obtaining commercially unusual data rights (for the purpose of enabling competition in reprocurement or sustainment) is a financial one; the impact on the bidders is financial, or potentially so, and the benefit to the government and/or other-company licensees of the IP is often conceived to be financial (among other benefits), or is potentially so. So what is the nature of the financial analysis that should be done to favor one bidder's IP rights approach over another's? Is the crucial question the number of items on the data assertion list? If so, how does this measure relate to life cycle cost? If the crucial piece of information is the price of the IP rights offered, how does this relate to life cycle cost? And if there is an analysis that attempts to tie the provision of IP rights and the price of those rights to life cycle cost, how exactly is this to be done? Is there a baseline life-cycle cost model for the weapon system that the procurement authority has created against which all data rights offers are assessed?

How is a bidder to gauge in advance how its proposed data rights package is to be assessed? Are there explicit criteria that will be used? Do these criteria bias the procurement decision toward: (1) commercial companies, (2) innovative companies that have invested significantly in the IP in question at private expense, (3) companies that have developed the lion's share of the IP in question on government contracts, (4) companies whose supply chains are full of commercial suppliers (who won't provide commercially unusual rights), or (5) companies that have little IP to which to grant rights? Which kinds of bidders does DoD prefer? Isn't DoD directed by statute and regulation to prefer commercial technologies and products, even when tailored to DoD requirements, when practicable?

By using a bidder's and the bidder's suppliers' willingness to relinquish IP rights at prices below their value as an evaluation factor, isn't DoD biasing its procurements away from commercial and innovative companies and toward companies that are non-commercial and that haven't invested much in IP rights in which DoD may have interest?

A company's unwillingness to provide commercially unusual and sometimes ownership-like rights (e.g. GPR and/or Unlimited Rights) to privately developed and commercial IP is often counted against such companies in procurements today. Even if a company is willing to provide such rights at a reasonable price—at a price that is approximate to the IP's value, calculated using IP valuation best practices and standards—that price can be counted against the offering company in a price-based competition. And even when the requested rights are limited in scope to the program or platform in question and limited to certain purposes, if these rights are priced by the IP owner, that price can be held (and sometimes is held) against the IP owner in a price-based competition.

Recommendation: Make changes to the DFARS that provide the following limitations when data rights are used as an evaluation factor:

1. Data rights requests pertaining to commercial items shall be limited to the kind of data and type of data rights provided routinely by the data rights owner in its sales of its commercial item in commercial markets.
2. The data rights requested shall be linked clearly through financial analysis to a financial advantage to the government.
3. The way in which data rights will be used in source selection analysis and decision-making must be made explicit to the bidders and must be justified to the satisfaction of life cycle cost and IP valuation experts.

Cross-reference to other Tension Points:

- **Section 1 (Business Model Concerns), Subsections a., b., c., and d.**
-

SEC. XXX. PILOT PROGRAM ON INTELLECTUAL PROPERTY VALUATION FOR MAJOR DEFENSE ACQUISITION PROGRAMS

(a) PILOT PROGRAM.—The Secretary of Defense and the Principal Military Deputies to the Assistant Secretaries of the Military Departments may jointly carry out a pilot program to evaluate commercially available intellectual property valuation analysis and techniques to better understand the benefits associated with these techniques on—

(1) Intellectual property strategies

(2) Intellectual property or Technical Data Rights value and costs during acquisition and sustainment activities throughout acquisition lifecycle

(3) Intellectual property-related costs

for each Major Defense Acquisition Programs of the Department of Defense.

(b) ACTIVITIES.—Activities under the pilot program may include the following—

(1) Establishing a team of Department of Defense and Private-Sector subject matter experts to perform intellectual property valuation techniques to obtain quantitative and qualitative analysis related to the value of intellectual property or Technical Data Rights during—

(A) Procurement

(B) Production & deployment

(C) Operations and support

(2) Assessment of novel or innovative commercial valuation, prioritization, and evaluation techniques for Intellectual Property or Technical Data Rights for use by the Department of Defense.

(3) Assessment of novel or innovative contracting mechanisms to speed delivery of intellectual property to the Armed Forces or reduce sustainment costs

(4) Engagement with the commercial industry to—

(A) Support the development of strategies and program requirements to aid in acquisition and transition planning for intellectual property

(B) Support the development and improvement of intellectual property strategies as part of Life-Cycle Sustainment Plans

(C) Propose and implement alternative and innovative methods of intellectual property valuation, prioritization, and evaluation techniques for intellectual property or Technical Data Rights

(c) ASSESSMENT.—Not later than one year after the commencement of the pilot program, and annually thereafter, each Major Defense Acquisition Program shall submit to the Armed Services Committees through the Secretary of Defense and the associated MILDEP, a report on the pilot program, including—

(1) An assessment of the effectiveness of activities under the pilot program

(2) An assessment of cost-savings or other benefits from the activities related to the pilot program, including any improvement to mission-success during Operations & support

(3) An assessment of improvements to acquisition or sustainment activities related to the pilot program

(d) LIMITATION ON AVAILABILITY OF FUNDS.—For each of fiscal years 2018 through 2022, of the amounts of expenditure for research, development, test, and evaluation (RDT&E), including all planned increments, for the Major Defense Acquisition Programs, not more than .25% may be expended on the pilot program in any such fiscal year.

DRAFT

Government-Industry Advisory Panel
Tension Point Development

Original Title: *Treatment of IR&D versus SFR&D for IP rights determinations; IR&D risk correct for limited/restricted rights?*

Author: Kelly Kyes

Tension Point: Government panelists, and a Government witness (Mr. Shay Assad (DPAP Director of Pricing), have questioned whether Independent Research and Development (IR&D) and Bid and Proposal (B&P) costs should continue to be treated as "private expenses" for purposes of determining the Government's rights in technical data. Government panelists have sought to distinguish between IR&D/B&P and other R&D funded out of company profit (deemed "Self-funded R&D" or "SFR&D") and have questioned the risk proposition for IR&D and B&P. Industry panelists strongly oppose any changes in the law and regulations that would treat IR&D and B&P as federal funding or otherwise expand the Government's rights in technical data pertaining to items or processes developed with IR&D/B&P.

Issue:

Comparison of the Commercial and U.S. Government Markets

All companies, in all markets and industries, seek to recover R&D costs in product pricing. A fundamental rule of establishing a pricing strategy in the commercial marketplace is that prices must cover both costs (such as R&D expenses) and profit. The objective of for-profit entities is not to break even or to be "made whole" by recovering costs such as research and development (R&D) investments. Rather, the end goal is to generate a return on investment (ROI) – profit.

One fundamental difference between the commercial marketplace and U.S. Government contracting is that U.S. Government contractors, with limited exceptions, do not have the freedom to set prices. Unlike the commercial marketplace, where sellers aim to establish prices that buyers are willing to pay, U.S. Government contracting is a highly regulated market in which the Government regulates costs and profit to ensure that it pays a fair and reasonable price for the products and services that it buys with taxpayer dollars.

Applicable laws and regulations such as the Cost Accounting Standards (CAS)[1] and the Federal Acquisition Regulation (FAR) cost principles specify the manner and extent to which contractors can recover costs under U.S. Government contracts. Unique costs classifications such as IR&D, B&P, and Manufacturing and Production Engineering exist only because of the unique nature in which the Government regulates these costs under U.S. Government contracts. The CAS dictate that contractors shall recover indirect costs such as IR&D and B&P through the General & Administrative (G&A) rate.

In Department of Defense (DoD) contracting, IR&D is funded and managed at the contractor's discretion, and depending on the regulatory framework in place at the time, some or all of the costs are later recovered in DoD contracts via G&A. While the method, and timing, of IR&D and

[1] See 41 U.S.C. 1501-1506, formerly 41 U.S.C. 422.

B&P recovery differs from the commercial marketplace due to CAS rules, the fact remains that all companies, in all markets and industries, seek to recover R&D costs in product pricing and sales.

IR&D and B&P Defined

The concept of IR&D expenditures first came into existence as the result of congressional efforts to limit contractor profits. In the 1934 Vinson –Trammell Act, Congress limited the profits on naval vessels and aircraft to 10% of the total contract price. In regulating contractor profits and costs, the Government was required to define "acceptable costs," and determine whether IR&D expenditures would be considered an acceptable cost. Treasury Decision 5000 clarified the policy and identified certain indirect R&D cost items that would be recognized by the Government, including a reasonable portion of "general experimental and development expenses which may be charged off currently''; indirect engineering expenses; and bidding and general selling expenses.[2]

IR&D is currently defined in the FAR as costs that consist of projects falling within the following four areas: (1) basic research, (2) applied research, (3) development, and (4) systems and other concept formulation studies. IR&D does not include: (1) costs of effort required in the performance of a contract or (2) technical effort expended in developing and preparing technical data specifically to support submitting a bid or proposal (i.e., B&P costs).[3]

B&P costs are currently defined in FAR 31.208-18 as the costs "incurred in preparing, submitting, and supporting bids and proposals (whether or not solicited) on potential Government or non-Government contracts." The term does not include the costs of effort sponsored by a grant or cooperative agreement, or required in the performance of a contract. B&P encompasses all effort, the fundamental purpose of which is the preparation of a solicited or unsolicited proposal. R&D effort to design and develop a product that would otherwise qualify as IR&D must be classified as B&P if the effort is directed at supporting a specific proposal. Thus, the distinction between IR&D and B&P is often an issue of timing.

The Existing IR&D IP Policy Was Implemented to Incentivize Innovation

The issue of what constituted "private expense" development in DoD contracting had been debated since at least the 1960s. In the 1980s, Congress established the current statutory policy in 10 USC 2320 of treating IR&D and B&P as private expenses for purposes of determining the Government's IP rights, in order to incentivize contractors to invest in innovation.

In Section 953 of the National Defense Authorization Act (NDAA) for 1987, Congress amended 10 USC 2320 to require the Secretary of Defense to define the terms "developed" and "private expense." The conference report accompanying the NDAA said the following:

[2] RAND Report: The Defense Department's Support of Industry's Independent Research and Development (IR&D), by Arthur J. Alexander, Paul T. Hill, Susan J. Bodily (1989), Page 6
[3] See FAR 31.205-18, Independent research and development and bid and proposal costs.

> *"Although agreeing that some flexibility in defining terms is necessary, the conferees believe that a statement of congressional intent is appropriate… In addition, the conferees agree that as a matter of general policy "at private expense" development was accomplished without direct government payment. Payments by the government to reimburse a contractor for its indirect costs would not be considered in determining whether the government had funded the development of an item. Thus, reimbursement for Independent Research and Development expenses and other indirect costs (capital funds and profits), although such payments are in indirect support of development efforts, are treated for the purposes of this Act as contractor funds."*

The following year, Congress amended 10 USC 2320 in the NDAA for FY 1988 and 1989 (Public Law No. 100-180) to require the DoD to define the terms "exclusively with Federal funds" and "exclusively at private expense." The amendment also added the following language, which remains codified in 10 USC 2320(a)(3) today:

> *"In defining such terms, the Secretary shall specify the manner in which indirect costs shall be treated and shall specify that amounts spent for independent research and development and bid and proposal costs shall not be considered to be Federal funds for the purposes of the definitions under this paragraph."*

The committee and conference reports accompanying the NDAA for FY1988 and 1989 did not provide any further information regarding congressional intent, beyond what Congress conveyed in the NDAA for FY 1987. However, in the conference report for the NDAA for the 1989, enacted into law the following year, Congress said the following in regard to its discussion on proposed changes to 10 USC 2305:

> *"INCENTIVES FOR INNOVATION*
>
> *Section 803 amends 10 USC 2305 which recognizes the value to the Nation of innovation by defense contractors using private funding. Private expense development for defense purposes enhances our ability to pursue a defense strategy based on technological superiority. As a consequence, the government has an interest in preserving an incentive for private industry to accept the risks inherent in such investment…"*

In the FY11 NDAA, Congress amended 10 USC 2320 to change the way IR&D and B&P are treated. However, those changes were repealed the following year in the FY12 NDAA.

<u>IR&D vs. SFR&D and Profit as an Incentive to Innovate</u>

In his comments to the Section 813 Panel, Mr. Assad asserted that there is "no risk" in IR&D because all (or most) IR&D is recovered, and recovered quickly (cash flow benefit), due to the manner in which the CAS require indirect costs to be recovered.[4] Industry panelist Kelly Kyes

[4] A contractor's annual IR&D budget is an estimated amount that is input into the calculation of Forward Pricing Rate Proposal (FPRP) G&A rates. The G&A rate is then submitted to Defense Contract Management Agency (DCMA) in the contractor's FPRP and the contractor and DCMA reach consensus on the FPRP. The rates contained

responded and said that there is risk in IR&D, as evidenced by the fact that contractors cannot frivolously and indiscriminately invest in IR&D due to potential impacts to contractor rates. If there was no financial or business risk associated with IR&D, then contractors would have no need to carefully invest IR&D dollars. After further discussion with industry panelists, Mr. Assad subsequently acknowledged that there is "some risk" in IR&D. Mr. Assad also suggested that the Government should obtain "government purpose rights" in the technical data pertaining to IR&D-funded technologies.

Ms. Kyes questioned Mr. Assad as to how the Government would incentivize a contractor to invest IR&D dollars if the Government could subsequently (with government purpose rights) provide the fruits of the contractor's investments to competitors to compete against the contractor in production or sustainment contracts.

In seeking to distinguish between IR&D and SFR&D, Government panelists have also cited a 2014 Defense Business Board (DBB) report[5] as supporting their position that the law and regulations re treatment of IR&D and B&P for IP purposes should be changed. The DBB Task Force made several recommendations in its report, to include a recommendation to "rebalance policies on the ownership and rights to IP." The Task Force reviewed three types of R&D (contracted R&D (CR&D),IR&D and SFR&D and summarized them as follows:

---

in the FPRP (including G&A) are then utilized in both proposals and billings under U.S. Government contracts. Budgeted IR&D expenditures that resulted in the FPRP negotiation between the contractor and the U.S. Government are reimbursed to the contractor in accordance with the terms and conditions in a U.S. Government Contract. Assuming the budgeted IR&D expenditures are close to the actual IR&D expenditures incurred by the contractor, the contractor is reimbursed for a certain portion of its estimated annual IR&D expenditure approximately 30 days after submitting a bill to the U.S. Government under a U.S. Government contract. Assuming FAR 52.232-25 is included in the contract, under the Prompt Payment Act an agency must make payment within the later of two events: (1) the 30th day after the designated billing office receives a property invoice from the contractor; or (2) the 30th day after Government acceptance of suppliers delivered or services performed. Payment is based on receipt of a "proper invoice and satisfactory contract performance." See FAR 52.232-25(a)(1), Prompt Payment and FAR 32.905(a), Payment Documentation and Process.

[5] Defense Business Board Report FY14-02, *Innovation: Attracting and Retaining the Best of the Private Sector*. http://dbb.defense.gov/Portals/35/Documents/Reports/2014/DBB-FY14-02-Innovation%20report%20%28final%29.pdf

Three Types of Research and Development (R&D)

Contracted R&D (CR&D) represents services for which the DoD contracts, as it does many kinds of services. In this case, the services constitute R&D services, with the focus being either general or specific. CR&D does not represent industry risk capital, nor should industry automatically have any kind of ownership of the intellectual property or technologies that result, unless such ownership is negotiated in the services contract.

Independent R&D (IR&D) represents expenditures that industry makes in undertaking R&D of its choosing, but with government funds. Specifically, the funds industry expends for this kind of research are bundled into its general and administrative or overhead cost pools and subsequently billed to the government on an established billing cycle. In the case of IR&D, the expenditures do not constitute industry risk capital, but do represent industry resource allocation decisions. Industry's claim that IR&D represents its own risk capital is in our view, wrong. Ownership of the intellectual property or technology that results from IR&D needs to be clarified. It would be appropriate for such ownership, or the rights to use the technology developed, to be shared between government and industry.

Self-funded R&D (SFR&D) is characteristic of the commercial industry, and also occurs (to a much lesser extent) within the DIB. It represents the expenditure of industry's own capital into R&D or other similar investment areas. In this case, the funds being invested are not recovered by bi-monthly, monthly, or progress payments charges to the government. This capital is truly risk capital by industry; ownership of the results of such investment, including intellectual property, should reside 100% with industry.

Industry panelists respectfully disagree with the DBB's summary of, and recommendations for, IR&D. First, IR&D is not equivalent to direct government funding. IR&D exists as a unique cost classification only because the defense industry is a regulated industry. If the Government did not regulate costs or profits, and the DoD acquired products and services through the negotiation of prices like customers in the commercial marketplace, then the DoD would have no visibility into contractor R&D costs and profit margins, and there would be no question whether defense contractor R&D expenses were industry risk capital. The reality is that in this regulated environment, where the Government regulates both costs and profit, the only practical way for traditional defense contractors to ensure that they recoup R&D investments in the sale of products or services to the DoD is through IR&D recovery. The CAS and the FAR do not provide any another effective mechanisms to recover previously expended R&D costs such as SFR&D.

Second, IR&D is industry risk capital, not just a simple resource allocation decision. However, the R&D risks in the commercial and defense markets are indeed different. There are variables that contribute to IR&D risk, many of which are beyond defense contractors' control: The technology may not "prove up"; the DoD may cancel planned programs, significantly delay new program starts, or buy fewer units than originally intended – all of which may undermine the projected ROI in the contractor's original investment decision; Congress may not fund a new program of record, or the procurement of additional lots, and finally, a contractor may not win

new business to which IR&D projects relate. If a contractor were to dramatically increase its IR&D expenditures without consideration of these business risks, and didn't capture sufficient new business, then the contractor's rates would increase, thus making it difficult for the contractor to compete on price in future DoD procurements.

As the DBB Task Force pointed out in its report, profit is risk-calculated and plays a role in companies' willingness to invest in innovation. In 2012, average profit margins in the defense industry were estimated to be 8.8 percent compared to high technology companies such as Intel (27.1 percent), Microsoft (37.8 percent), Apple (35.4 percent), IBM (21.1 percent) and Cisco (26.8 percent).[6] Figure 14 in the DBB report also illustrates a similar profit margin comparison. In the hi tech industry, the anticipated ROI justifies the SFR&D investment risk. These companies spend billions in SFR&D to develop and sell thousands, hundreds of thousands, or even billions of products. For example, in July of 2016, Apple announced that it had sold its *billionth* iPhone.

In comparison, U.S. defense contractors generally develop their products for sale to one customer, the U.S. Government, which may buy a few hundred units of a product. Additional sales may or may not be possible with the addition of foreign military sales. Most SFR&D performed by the defense industrial base is performed by companies with hybrid business models, which have both commercial and defense divisions. Traditional defense contractors, which do not have commercial portfolios, do not have the flexibility to offset SFR&D risks through commercial sales. They generally cannot justify the risks associated with SFR&D because they would have very limited opportunities to recover their investments. SFR&D occurs at a much lower rate in the defense industry because traditional defense contractors generally cannot justify the risks of SFR&D investments with projected sales and profit margins.

Finally, the DFARS already recognizes the unique differences between IR&D and the majority of SFR&D performed in the defense industrial base. The DFARS prescribes different policies for acquiring commercial and noncommercial technical data, with the DoD generally acquiring only the commercial technical data that is customarily provided in the commercial marketplace.

IP Protection as an Incentive to Innovate

In 1987, Congress defined IR&D and B&P as private expense in order to incentivize contractors to invest in IR&D. While the DBB Task Force discussed profit as an incentive to invest in its report, it did not discuss the extent to which IP protection incentivizes IR&D investment. Further, the Task Force did not analyze the extent to which modifying the IP framework for IR&D/B&P may impact defense contractors' willingness to invest in IR&D.

As discussed above, traditional defense contractors generally cannot justify significant SFR&D investments with existing profit margins. If the Government were to change its IR&D IP policy, it is unlikely that traditional defense contractors would shift the bulk of their IR&D expenditures to

[6] *Five factors plaguing Pentagon procurement.* William C. Greenwalt**,** *American Enterprise Institute*, downloaded at: https://www.aei.org/publication/five-factors-plaguing-pentagon-procurement/print/

SFR&D. Instead, contractors may forego certain investments altogether. Thus, significant questions are left unanswered in the DBB report –

1. If the Government removes contractors' ability to secure a competitive advantage by protecting the IP pertaining to IR&D-funded technologies, then how will the Government incentivize contractors to invest in IR&D?
2. If the Government changes its IR&D IP policy, would overall IR&D expenditures in the defense industrial base decline, at a time when the U.S. Government is concerned about threats to U.S. military superiority?
3. How would changes to the existing IR&D IP policy impact the overall health of the defense industrial base? Would companies exit the market altogether?
4. Is the DoD prepared to offset a potential decline in contractor IR&D investments through an increase in CR&D?

Recommendation:

Industry panelists strongly oppose any changes to the existing IR&D IP policy at this time, without further study and analyses to assess the potential impacts to overall IR&D spending in the defense industrial base.

Cross-reference to other Tension Points:

- Section 1 (Business Model Concerns)
- Section 4.a.ii, Indirect cost pools are considered privately funded

Government Industry Advisory Panel
Tension Point – Is Source of Funding the Best way to Determine Rights to Tech Data?

Original Title: 4.a.iv. Funding test for rights: is it the correct test or is there a less complex alternative?

Authors: Theodora Hancock , Mark Borowski

Tension Point: Does DoD's current approach – determining rights to technical data and software based on source of funding - meet its needs while providing industry a predictable business model, at a reasonable cost to the taxpayer? Are there other alternatives worthy of consideration?

Issue: Because of its unique mission, DoD requires more access to data and software than other consumers. Anecdotal evidence indicates that this may have caused leading technology firms to avoid the defense business for fear that their competitive edge might be compromised. This effect reduces the size of the defense industrial base and puts one DoD interest in conflict with another.

DoD invests in myriad technologies to secure its own competitive (and innovative) advantage and encourages industry to do the same. DoD has an interest in providing industry with a predictable business model that supports making these investments. But DoD also has an interest in seeing that its own investments provide a reliable return. The challenge is to balance these competing interests at a reasonable cost to the taxpayer.

CURRENT POLICY (DFARS Part 27):

The DFARs allocates Government rights in data and software **(1) according to the funding contributions of the parties and (2) specifically negotiated rights.**

1. **Source of Funding:**

(a) *Unlimited rights* - The Government obtains unlimited rights in technical data for items, components, or processes **developed exclusively with Government funds**
(b) *Government purpose rights* - The Government obtains rights in technical data pertaining to items, components, or processes developed with **mixed funding (unlimited after 5 years)**
(c) *Limited rights/Restricted rights* – Government has restricted rights to data, if items, components, or processes were **developed exclusively at private expense**

The strength of the Source of Funding method is that everyone understands the concept that "rights go with funding," partly because there is an inherent justice in having the party who paid for the development risk reap the reward.

Weakness: The concepts of "mixed funding," "developed," "government funds," "private expense," and "segregability" are unique to DoD and are not used in the licensing of other types of intellectual property. There is very little agreement between DoD and industry how a sensible policy should apply in practice. Even when there is agreement, policing these concepts is burdensome because they require information to be recorded and maintained that is not ordinarily recorded and maintained in the usual course of business.

2. **Specifically Negotiated License Rights:**

When using this approach, the parties agree to modify the standard license rights granted to the Government e.g. GPR. Another reason for this approach is when the Government wants to obtain data in which it does not have rights and there is a need to disclose the data outside the Government or it requires additional rights for competitive reprocurement and the anticipated savings expected to be obtained through competition are estimated to exceed the acquisition cost of the additional rights.

The strength of the negotiated license rights is its flexibility.

The weakness of this approach, if practiced as a default rule, is that it could undermine other DoD interests. Also, when every program negotiates its own deal, industry is deprived of a predictable business model on which it can make future investments. DoD arguably loses out on this basis as well because of the variability in skills and expertise at the program level and the limited knowledge available at the early phases of the acquisition, when the government has leverage to negotiate.

ALTERNATIVES TO CURRENT POLICY:

1. **Needs-Based Acquisition of Technical Data Rights:** This is a variant of the specially negotiated license approach wherein DoD's acquisition programs purchase data and software only as it is needed. Another variant of this approach would be that DoD acquires certain amount of data and software on every program based on some presumptive need, such as for spare-parts procurements or depot-level maintenance.

Strength: It is easier to negotiate and purchase data and software when specific needs are known, so long as those needs can be traced to particular data and software end items and the market dynamics facilitate a bargained-for exchange.

Weakness*:* DoD acquisition personnel do not have perfect knowledge of life cycle needs in the early phases of the program, when they have negotiation leverage. When market dynamics are not favorable to DoD, coming to agreement on a fair and reasonable price for the data and software has been very difficult, if not impossible, unless DoD is willing to pay a very high price.

2. Temporal-Based Standards: This is a variation on how rights in data and software could be allocated through the DFARS. Rather than establish a unique framework, this approach relies on the timing of when readily understood criteria are met to allocate rights in data and software to DoD. The patent clauses provide an example of such an approach. A variant of this approach could establish a basic scheme that allows rights to become more permissive over time, thereby granting a limited time to industry to recoup investment costs.

Strength: If the right criteria are used, rights could be allocated according to readily observable events in relation to a contract's performance period. Some continuous administration would be required, but the potential disagreement between DoD and industry is reduced, when the criteria is more objective. This already exists for GPR.

Weakness: Establishing criteria that were not overly intrusive or required burdensome administration may not be straightforward. Further, unlike commercial companies, which bear the entire burden of their R&D investment, defense industry's R&D costs are often borne by DoD. Defense industry further benefits because companies can patent their "technological breakthroughs" and thus increase their future profits, even when the R&D costs were borne by DoD.

3. Copyright-Based Standards: Copyright standards, as opposed to the patent-like standards embedded in the DFARS, could be adapted to allocate rights in data and software given that both are forms of copyrightable works. Most open source licenses operate from copyright-based standards and principles.

Strength: Copyright standards may be easier to administer and come with a well-developed, highly nuanced, and well-understood body of statutory and case law. Relying on this background, it may be easier to assess DoD needs using agreed to definitions and use cases rather than invoke vague statutory and regulatory concepts.

Weakness: Computer databases are not protected under U.S. copyright law, and thus would need separate coverage. There is also no protection for industry trade secrets. DoD's past attempt to protect industry trade secrets expressly was not successful. Use cases also may not be beneficial if future requirements are uncertain.

4. Directed Licensing Approaches: This approach allows DoD to require manufacturers to license technical data (and sometime provide technical assistance) to establish alternative sources. The manufacturer is paid a fee for the services (if required) and a royalty for providing the data and software to the alternative source. RAND licensing schemes, which are often used by standards setting organizations, are comparable to a directed license.

Strength*:* In a directed licensing scenario, a contractor remains in control of the data and software while DoD retains the benefits of having an alternative source without having to establish one directly.

Weakness: The terms of directed license arrangement must be negotiated while market forces provide leverage e.g. prior to contract award. This includes the royalty rate for any required data or software. Additional fees for services must be addressed on a case-by-case basis, but allowable costs for such services are easier to evaluate.

RECOMMENDATIONS:

We do not recommend any of the above enumerated alternative approaches as replacement to the Source of Funding approach but rather as supplemental approaches to be explored by the parties, as circumstances of the specific acquisition dictate. Adding these alternatives to the present scheme could be accomplished through regulation – DFARS Part 27.

Cross-Reference to Other Points: This issue relates to Tension Point 4.b. I, ii, iii, iv - Rights in Relation to Needs

DRAFT

Government-Industry Advisory Panel
Tension Point Development

Original Title: *(4)(b)(i) Rights in relation to needs: Commercial software terms versus Government-unique requirements.*
Authors: *James McEwen*

Tension Point: Commercial software licenses have terms which the Government believes need to be changed to meet procurement objectives.

Issue:

The Panel has received information and testimony about issues relating to commercial software licenses being used by the Government. Specifically, the normal commercial practice for licensing software to an end user is for the software owner to attach a contract to its software, and any end user of that software license will be bound to that license: an End User License Agreement (EULA). Distribution entities, such as prime contractors, who are merely distributing the software will have a separate license from the distribution or value added reseller license which allows these distribution entities to provide the software to the end user. Each EULA is drafted uniquely to meet a particular risk profile for the software, usually reflecting the amount paid by the end user for a copy, the size of the software owner, and the amount of customization the software owner allows.

Industry representatives note that, while some software owners are willing to negotiate their EULAs to meet a particular user's needs, but other owners would prefer not to license the software at all or make it difficult to negotiate a EULA.

Government end users have specific procurement laws and statutes which can conflict with these EULAs. This results in Government users being required to review each EULA being provided to ensure consistency with laws and needs. Government representatives have maintained that EULAs do need to be adjusted in many cases to meet these needs, but there is no consistency on which EULA clauses need to be changed due to conflicts with law and which need to be changed due to conflicts with agency needs for a particular procurement. Further, negotiation of each EULA for each procurement is a drain on Government resources, and there is a need to ensure any negotiated EULA is preserved.

Industry representatives have noted that, in order to meet this need, Government end users are increasingly attempting to mandate changes to EULAs. As examples, Industry representatives point to the use of H clauses to require specific standard EULA clauses and FAR clause, FAR 52.232-39, which was created to address a potential Anti Deficiency Act issue. Industry representatives have acknowledges that EULAs may need to be changed for specific issues, but note that any such change changes the risk profile for each particular EULA, and each change (if made standard) is contrary to the requirements of 10 U.S.C. 2377 and similar statutes requiring the use of commercial terms and conditions to the extent such requirements are not required by law. Industry representatives have also complained that the use of H clauses and FAR clauses to change EULAs is inappropriate since these clauses are only

applied to the prime contract, and are not direct negotiation with the software owner such that they become inappropriate flowdowns causing risks to the supply base and prime contract resources to attempt to negotiate the Government's terms.

The Panel also received information about issues relating to Foreign Military Sales. Under a Foreign Military Sale, the Government is not the end user and should only have a distribution right. Therefore, the Government should not be evaluating EULAs or suggesting changes to EULAs except as directed by the Foreign Military Sale customer.

The Panel further received comments from Government personnel that current regulations do not account for storage of commercial software licenses. Commercial software licenses are not issued as regulations, it is possible that such licenses would be lost. Since many commercial software licenses are for an indefinite term license, the existing records retention regulations do not account for the necessary protections of commercial software licenses.

Recommendation:

The Panel does not recommend any changes to 10 U.S.C. 2320 or 2321.

The Panel recommends that the following changes be made to the DFARS

227.7202-3 Rights in commercial computer software or commercial computer software documentation.

(a) The Government shall have only the rights specified in the license under which the commercial computer software or commercial computer software documentation was obtained, including where the Government is an end user for the software or is a distributor of such software to a third party under a Foreign Military Sales under DFARS 225.73. To the maximum extent possible, the Government should use any existing terms and conditions already negotiated between the Government and the software owner. The contracting officer shall ensure that agency record retention rules preserve such license for the applicable term of the license

(b) If the Government has a need for rights not conveyed under the license customarily provided by the software owner to the public, the Government must negotiate with the ~~contractor~~ software owner to determine if there are acceptable terms for transferring such rights. The specific rights granted to the Government shall be enumerated in the contract license agreement or an addendum thereto.

(b) Where the Government is evaluating a potential change to the license customarily provided to the public, the Government will identify the risk to the software owner in making such change, consult with agency IP counsel, and only propose a change which is least impactful to the software owner while consistent with Government laws and regulations and avoiding an impact to pricing in the contract under which the software owner is providing the software to the

Government. The Government will directly negotiate such potential changes with the software owner, and the software owner will provide any changes to the software owner's license to the contractor.

227.7202-4 Contract clause.

A specific contract clause governing the Government's rights in commercial computer software or commercial computer software documentation is not prescribed. As required by 227.7202-3, the Government's rights to use, modify, reproduce, release, perform, display, or disclose computer software or computer software documentation shall be identified in a license agreement. Any contract provision which mandates a change to a commercial software license is expressly prohibited except as mandated for clauses in the FAR or DFARS.

227.7102-4 Contract clauses.

(d) Where the Government's acquisition of the technical data also includes the need to provide the technical data to a third party under a Foreign Military Sales under DFARS 225.73, the above clauses may not provide an appropriate end user license to that third party. The Government will obtain an end user license from the technical data owner for the third party which will provide restrictions consistent with commercial practices and allow the Government to distribute the technical data to the third party end user. The contracting officer shall ensure that agency record retention rules preserve such end user licenses for the applicable term of the license.

227.7103-6 Contract clauses.

(f) Where the Government's acquisition of the technical data also includes the need to provide the technical data to a third party under a Foreign Military Sales under DFARS 225.73, the above clauses may not provide an appropriate end user license to that third party. The Government will obtain an end user license from the technical data owner for the third party which will provide restrictions consistent with commercial practices and allow the Government to distribute the technical data to the third party end user. The contracting officer shall ensure that agency record retention rules preserve such end user licenses for the applicable term of the license.

227.7203-6 Contract clauses.

(g) Where the Government's acquisition of the computer software or computer software documentation also includes the need to provide the technical data to a third party under a Foreign Military Sales under DFARS 225.73, the above clauses may not provide an appropriate end user license to that third party. The Government will obtain an end user license from the computer software or computer software documentation owner for the third party which will provide restrictions consistent with commercial practices and allow the Government to distribute

the computer software or computer software documentation to the third party end user. The contracting officer shall ensure that agency record retention rules preserve such end user licenses for the applicable term of the license.

Cross-reference to other Tension Points:

- 1b. Commercial return on investment over years versus depot and competition requirements.
- 3 d. Need for Government flexibility to use existing tools versus need for legal review of H clauses and evaluation criterion (versus 10 U.S.C. 2320; versus CICA).
- 4av. Commercial items vs noncommercial items
- 5i. Embedded software (the object code) versus source code (human-readable) and software design documentation (the data used to produce the object code).
-

DRAFT

Government-Industry Advisory Panel
Tension Point Development

Original Title: 5.e Operation, Maintenance, Installation, and Training (OMIT) versus detailed manufacturing and process data (DMPD)

Authors: Dr. Roger Hamerlinck

Tension Point: OMIT versus DMPD. Current statute and policy calls out default rights for OMIT but excludes DMPD. OMIT is not defined in statute or policy. DMPD is defined in the Defense Federal Acquisition Regulation Supplement (DFARS).

Issue: What is "maintenance" as used in OMIT in relation to "manufacturing" in DMPD and whether the Department of Defense (DoD) depots perform maintenance or manufacturing DMPD.

Recommendation:

Define OMIT data as the data necessary to operate, maintain, install, and train military and civilians in the proper operation and maintenance of equipment and software from the operator, crew, organizational, intermediate and depot-level. For software, reference Title 10 USC Section 2460(a), Definition of Depot-Level Maintenance and Repair, and Defense Financial Management Regulation (FMR), Volume 6.a, Addendum 5, Software Maintenance. For hardware, reference Title 10 USC Section 2464(a) Core Logistics Capabilities, and Department of Defense Instruction (DODI) 4151.20(E1.7) – Depot Maintenance Core Capabilities Determination Process

10 USC 2320 Title. Change to read: "Rights in Technical Data and Computer Software". This change is necessary for several reasons: 1) the addition of Modular Open Systems Approach (MOSA) applies to both equipment and software; 2) in association with MOSA is the application of "interface" data; and 3) weapon systems are including more and more software in their design, operation, and maintenance. Reference Title 10 USC Section 2460(a), Definition of Depot-Level Maintenance and Repair.

10 USC 2320(a)(1). Change to read: "…legitimate interest of the United States and of a contractor or subcontractor in technical data and computer software pertaining to an item or process…" and "…third party a fee or royalty for the use of technical data and software pertaining to an item or process…" This change is necessary to continue the theme of the title of the statute.

10 USC 2320(a)(2)(A)(i). Change to read: "use technical data and computer software pertaining to the item or process; or".

10 USC 2320(a)(2)(A)(ii). Change to read: "release or disclose the technical data or computer software to persons outside the government…"

10 USC 2320(a)(2)(B). Change to read: "…technical data and computer software pertaining to the item or process to persons outside the government or permit the use of the technical data or software by such persons. This includes detailed manufacturing and process data."

10 USC 2320(a)(2)(C)(iii). Change to read: "is necessary for operation, maintenance, installation, or training; or". This attempts to remove the confusion between maintenance and manufacturing by only talking about OMIT in this paragraph and moving the detailed manufacturing and process data to (a)(2)(B). Also, recommending eliminating the phrase "including such data pertaining to a major system component" because we do not want to confuse maintenance and manufacturing, especially as it might apply to MOSA.

10 USC 2320(a)(2)(D). Change to read: "…or permit the use of technical data or computer software by such persons, if –".

10 USC 2320(a)(2)(D)(II). Change to read: "…disclosure, or use of technical data or computer software pertaining to an interface…"

10 USC 2320(a)(2)(D)(III). Change to read: "…disclosure of technical data and computer software (other than detailed manufacturing or process data…"

10 USC 2320(a)(2)(D)(ii). Change to read: "…prohibition that the person to whom the data or computer software is released or disclosed may not further release…"

10 USC 2320(a)(2)(E). Change to read: "…contractor or subcontractor in technical data or computer software pertaining to such…" and "…based on negotiations (with the exception of (a)(2)(C) above) except in any case in which the Secretary of Defense…"

10 USC 2320(a)(2)(F). Change to read: "Notwithstanding subparagraphs (C) and (E)…" and "…government purpose rights in technical data or computer software pertaining to an interface (except where such data is FFF or OMIT) between an item or process..." and "…that negotiation of different rights in such technical data or computer software would be in the best…"

10 USC 2320(a)(2)(G). Change to read: "…Notwithstanding subparagraphs (B), (C) and (E), the United States shall have government purpose rights in technical data or computer software pertaining to a…" and "…negotiation of different rights in such technical data or computer software would be…" and "…For technical data or computer software pertaining to a major system…"

10 USC 2320(a)(2)(H)(i). Change to read: "…any rights in technical data or computer software except-…"

10 USC 2320(a)(2)(H)(i)(I). Change to read: "…rights in technical data or computer software described in…"

10 USC 2320(a)(2)(H)(i)(II). Change to read: "…rights in technical data or computer software described…"

10 USC 2320(a)(2)(I)(i). Change to read: "……acquisition of rights in technical data or computer software not otherwise provided…"

10 USC 2320(a)(2)(I)(ii). Change to read: "…restrict rights in technical data or computer software otherwise…"

10 USC 2320(a)(2)(I)(iii). Change to read: "…third party the use of technical data or computer software which the contractor…"

10 USC 2320(a)(3)(b). Change to read: "…contain appropriate provisions relating to technical data or computer software, including provisions…"

10 USC 2320(a)(3)(b)(1). Change to read: "…subcontractor (at any tier) regarding any technical data or computer software to be delivered…"

10 USC 2320(a)(3)(c)(1). Change to read: "…the United States all technical data or computer software required to be delivered to the…"

10 USC 2320(a)(3)(c)(2). Change to read: "…of any technical data or computer software delivered under a contract…"

10 USC 2320(a)(3)(c)(3). Change to read: "…regarding the respective rights in technical data or computer software of the United…"

10 USC 2320(a)(3)(e). Change to read: "…systems to assess the long-term technical data and computer software needs of such…" and "…strategies that provide for technical data or computer software rights needed to sustain…"

10 USC 2320(a)(3)(e)(2). Change to read: "…the future delivery of technical data or computer software that were not…"

10 USC 2320(a)(3)(f)(2)(A). Change to read: "…proprietary or nonpublic technical data or computer software furnished will be…"

10 USC 2320(a)(3)(f)(2)(B). Change to read: "…contractor to whom the rights to the technical data or computer software belong."

10 USC 2320(a)(3)(f)(2)(C). Change to read: "…nonpublic nature of the technical data or computer software furnished to the covered…" and "…from disclosing the technical data or computer software outside…"

10 USC 2320(a)(3)(f)(2)(D). Change to read: "…ownership or rights in such technical data or computer software may subject…"

10 USC 2320(a)(3)(f)(2)(D)(ii). Change to read: "…subcontractor whose technical data or computer software is affected…"

10 USC 2320(a)(3)(f)(2)(E). Change to read: "that such technical data or computer software provided…"

DFARS 227.7103-5(a)(5). Change to read: "Necessary for operation, maintenance, installation, and training."

DFARS 227.7103-5(b)(4). Add subparagraph (iii) Detailed Manufacturing and process data when necessary for depot-level maintenance."

DFARS 252.227-7013(a). Insert a subparagraph (15) and renumber the remaining subparagraphs. "(15) Operation, maintenance, installation, and training data" means the data necessary to operate, maintain, install, and train military and civilians in the proper operation and maintenance of equipment and software from the operator, crew, organizational, intermediate and depot-level."

DFARS 252.227-7013(b)(1)(v). Change to read: "Necessary for operation, maintenance, installation, and training;"

DFARS 252.227-7013(b)(2)(iii). Add subparagraph (C) "Detailed manufacturing and process data when necessary for depot-level maintenance."

DFARS 252.227-7014(a). Add subparagraph (15) and renumber the remaining subparagraphs. "(15) Operation, maintenance, installation, and training data" means the data necessary to operate, maintain, install, and train military and civilians in the proper operation and maintenance of equipment and software from the operator, crew, organizational, intermediate and depot-level."

DFARS 252.227-7015(a). Insert a new subparagraph (4) and renumber the remaining subparagraphs. "(4) Operation, maintenance, installation, and training data means the data necessary to operate, maintain, install, and train military and civilians in the proper operation and maintenance of equipment and software from the operator, crew, organizational, intermediate and depot-level."

DFARS 252.227-7018(a). Insert a new subparagraph (18) and renumber the remaining subparagraphs. "(18) Operation, maintenance, installation, and

training data means the data necessary to operate, maintain, install, and train military and civilians in the proper operation and maintenance of equipment and software from the operator, crew, organizational, intermediate and depot-level."

DFARS 252.227-7018(b)(1)(ii). Change to read: "Necessary for operation, maintenance, installation, and training;"

DFARS 252.227-7018(b)(3). Add this sentence: "This includes detailed manufacturing and process data."

Cross-reference to other Tension Points: 1a, 2b, 2c, 2d, 2f, 5a, 5d, 5g, and 5i.

DRAFT
Government-Industry Advisory Panel
Tension Point Development

Original Title: *(5)(g) Poor DID alignment with statutory/regulatory categories (FFF, OMIT, etc.).*
Authors: *James McEwen*

Tension Point: The DFARS has specific data rights associated with increasing competition regardless of funding, but there is no corresponding Data Item Description or standard documents which align with these specific data rights to facilitate ordering such data

Issue:

The Panel has been discussing specific DFARS categories of data which, regardless of funding, are licensed with unlimited rights. These categories are designed to provide enough data to maintain and procure substitute goods, but without allowing third party access to the contractor's specific trade secrets when developed exclusively at private expense. For technical data, DFARS 252.227-7013 and 252.227-7015 grant unlimited rights in FFF (form fit function) data, and for OMIT data (data necessary for operations, maintenance, installation and training purposes except for detailed manufacturing or process data). For non-commercial computer software, DFARS 252.227-7014 grants unlimited rights in computer software documentation. These terms are defined in these clauses, and have a specific contractual meaning defined in these clauses.

The Panel also notes that, in the 2017 NDAA, there are now two new terms which need to be defined where the Government will have rights not based on funding:

- Interface data (technical data pertaining to an interface between an item or process and other items or processes)
- major systems interface data (a shared boundary between a major system platform and a major system component, between major system components, or between major system platforms, defined by various physical, logical, and functional characteristics, such as electrical, mechanical, fluidic, optical, radio frequency, data, networking, or software elements; and '(B) is characterized clearly in terms of form, function, and the content that flows across the interface in order to enable techno logical innovation, incremental improvements, integration, and interoperability.)

The Panel has received comments from Government and Industry sources about the appropriateness of changing these definitions, especially in regard to ensuring Department depots are able to obtain necessary levels of data to perform their maintenance and sustainment functions. The Panel has also received information that the Department is attempting to use these definitions in H clauses to obtain CDRLs limited only to OMIT data, and there is Department guidance which advises using only FFF and OMIT data where more detailed data is unavailable due to Limited Rights restrictions.

However, the Panel has also received industry and government comments that such attempts to obtain CDRLs limited to OMIT data are frustrated by a conflict with requirements in the

Comment [RDH1]: Are we equating FFF and OMIT to "trade secrets" now?

Comment [RDH2]: Someone needs to segregate "interface" data from FFF and OMIT. There are occasions where FFF includes interface data.

Comment [RDH3]: I do not recall a specific discussion about relating interface data to depot maintenance. There has been some discussion regarding "open" and "closed" standards as they relate to maintenance in general and specific to depot. The short hand title of the discussion was "black box" items and how that related to having data necessary for conducting maintenance and supply inventory.

Comment [RDH4]: I do not recall any discussion that limited "H" clauses to OMIT data and/or FFF data. Are we mixing apples and oranges here?

Comment [RDH5]: What CDRL is limited to OMIT data? A Data Item Description (DID) a Technical Manual, for instance, potentially requires FFF and OMIT data (part numbers, NSNs, operation and maintenance instructions, parts explosions to show how items fit together, etc.). A CDRL is developed to get this DID requirement delivered under contract.

statement of work or Data Item Description which require detailed manufacturing or process data. The Panel has received input that such H clauses are not necessary to order OMIT only CDRLs as long as the statement of work or Data Item Description instruct the CDRL author to remove the detailed manufacturing or process data or to only include FFF as defined in DFARS 252.227-7013 and 252.227-7015. The Panel received a comment that ASME STD Y14.24 describes types of drawings, such as control drawings, which may be exclusively FFF or OMIT data, or have very limited detailed manufacturing or process data.

While no comments were received, the Panel is also not aware of Data Item Descriptions which define the format and content needed to obtain interfaces and major system interfaces needed for open architecture and modular open system approaches. As directed in the 2017 NDAA, the Government will have specific rights in these documents once implemented in DFARS 242.227-7013, 252-227-7014, and 252.227-7015.

The Panel is not aware of any standard Data Item Descriptions number, military specifications, or military standards which define CDRLs which align with these licensed rights, or use industry standard definitions which naturally align with these definitions and which would encourage competition while protecting contractor rights.

The Panel has also been provided information that specific Data Item Descriptions include requirements to identify rights in data, which is duplicative of (and potentially in conflict with) DFARS 252.227-7017 (with amendments after award implemented under DFARS 252.227-7013(e) and 252.227-7014(e)). Examples of such DIDs include the requirement in the Data Accession List to indicate a data rights category, as well as in the Material Data Report which has a similar requirement.

Recommendation: Detailed recommendation limited to 2 pages *(Include any express changes to 2320 or 2321)*

The Panel does not recommend any changes to 10 U.S.C. 2320 or 2321.

The Panel does not recommend any changes be made to the DFARS

The Panel does recommend that the Department create Data Item Descriptions number, military specifications, or military standards to align with the following licenses for use in competitive procurement and upgrades without contractor data rights restrictions:

- FFF (form fit function) data as defined in DFARS 252.227-7013 & 252.227-7015,
- OMIT data (data necessary for operations, maintenance, installation and training purposes except for detailed manufacturing or process data) as defined in DFARS 252.227-7013 & 252.227-7015.
- Computer software documentation as defined in DFARS 252.227-7014

Comment [RDH6]: What DID specifically calls for DMPD? A DID for a Depot Maintenance Work Requirement (DMWR), for instance, potentially requires, FFF, OMIT, and DMPD (everything required for a Technical Manual, plus identification of Depot Maintenance Plant Equipment, special tools and test equipment, Quality Provisions, etc.). This DID is identified on a CDRL for delivery under contract.

Comment [RDH7]: Again, What DID and/or CDRL orders OMIT only data?

Comment [RDH8]: DIDs do not distinguish between the legal forms of data. They identify the data content and format for the data deliverable and it is identified for delivery on the CDRL. I am unaware of any DID that specifically requires the requiring activity to exclude DMPD from the DID and CDRL deliverable. DFARS identifies OMIT as excluding DMPD.

Comment [RDH9]: ASME STD Y14.24 identifies the types of drawings. Several of these types of drawings are identified as being suit able for item identification. I was unable to find anywhere in the standard that specified a legal form of data.

Comment [RDH10]: I am unaware of any DID that is specific to a legal form of data. FFF, OMIT, Interface, DMPD are all legal forms of data that do not necessarily have a direct correlation to the terminology used in the various functional areas work. What data on a drawing is FFF, OMIT, Interface, DMPD? Is the data included in a "test report" FFF, OMIT, Interface, or DMPD? There is a DID for delivery of a "test report" but it does not distinguish between these forms of data.

Comment [RDH11]: A SOO/SOW/PWS in a contract describes the work to be performed by the contractor. In doing this work there might be data that is desired for delivery. The DID describes that data and content. A DID is usually supported by a military or commercial specification or standard and it is identified on the DID. The CDRL is used to order the data described in the DID for delivery under a contract. Again, these DID and their associated data do not have a direct correlation to the legal forms of data.

Comment [RDH12]: You also have to allow for commercial specification and standards.

- Interface data (technical data pertaining to an interface between an item or process and other items or processes) as will be defined in DFARS 252.227-7013, 252.227-7014 & 252.227-7015
- Major systems interface data (a shared boundary between a major system platform and a major system component, between major system components, or between major system platforms, defined by various physical, logical, and functional characteristics, such as electrical, mechanical, fluidic, optical, radio frequency, data, networking, or software elements; and '(B) is characterized clearly in terms of form, function, and the content that flows across the interface in order to enable techno logical innovation, incremental improvements, integration, and interoperability) as will be defined in DFARS 252.227-7013, 252.227-7014 & 252.227-7015.

The Panel also recommends that DoD 5010.12M be revised to incorporate a section, including examples, of how to define and order CDRLs using the created Data Item Descriptions number, military specifications, or military standards, and describe how they are used to encourage competition while protecting contractor rights in their privately developed or commercial technology.

The Panel also recommends that the existing Data Item Descriptions number, military specifications, or military standards be reviewed to ensure that these document formats are not creating duplicative reporting requirements of reporting requirements in a DFARS clause.

Cross-reference to other Tension Points:

5d. Form, fit & function (vs. segregation/reintegration or interface) technical data; software documentation versus FFF.
5e. OMIT versus detailed manufacturing and process data (DMPD).

Comment [RDH13]: DOD 5010.12M has been revised and is awaiting legal review before we can publish it. A SOO/SOW/PWS describes the work to be done under contract. The DID describes the data content and format and is based on military and/or commercial specifications and standards. The CDRL is what is used to have the data delivered under contract. All of this is explained appropriately in DOD 5010.12M.

Comment [RDH14]: Agreed that the DIDs need to be reviewed. Do not understand the reference to duplicative reporting requirements associated with a DFARS clause. In a classical acquisition framework program, the design and data evolve over time. Developmental and Operational testing take place and the test data is analyzed, which drives changes to the design and for which additional data is generated. Over the course of a system development I may have multiple contracts that may have the same DID/CDRL delivery requirements. Please be more specific as to the duplicity that you see.

DRAFT
Government-Industry Advisory Panel
Tension Point Development

Original Title: *(5)(h) 10 U.S.C. 2321 protections versus complexity too high to get meaningful case law.*
Authors: *James McEwen*

Tension Point: The validation process is too cumbersome and confusing for use

Issue: Overview of the tension point

The validation process is required by 10 U.S.C. 2321 and implemented in contracts DFARS 252.227-7037 and 252.227-7019. This process provides a specific process for the Government to follow when the Government believes that restrictions on data delivered under the contract are in appropriate under the allocation of license rights in the contracts clauses (DFARS 252.227-7013, 252.227-7014, 252.227-7015 and commercial licenses). This process provides burdens of proof on both the Government and contractor, and specific time tables for response.

The Panel has received comments from industry that the validation process is cumbersome. One is that 10 U.S.C. 2321(d)(2)(B) restricts the grounds for challenges (and effectively prevents challenges based on development funding) if the challenge is not brought within six (6) years of the later of the data delivered or final contract payment. For complex contracts, this creates an extended challenge deadline of perhaps decades until the contract is closed, and is inconsistent with other contractual disputes which need to be resolved within six (6) years of claim accrual (41 U.S.C. § 7103(a)(4)(A)). These industry comments believe that the statute should be changed to limit 10 U.S.C. 2321(d)(2)(B) to only apply to six (6) years after delivery of the data. It is noted that such a change would not affect the Government's ability to challenge for other grounds listed in 10 U.S.C. 2321(a)(2)(A). The Panel did not reach a consensus on the advisability of changes the statute.

The Panel received a comment from industry relating to the complexity of the validation process for commercial items. For commercial items, the applicable license is either DFARS 252.227-7015 or the associated commercial technical data license if the item meets the definition of commercial item under FAR 2.101. The commercial item definition does not require items to be developed exclusively at private expense to qualify as commercial items. Further, commerciality claims are governed by regulations outside of DFARS 227 or 10 U.S.C. 2321. While 10 U.S.C. 2321 does require a presumption of development at private expense, since the Government's rights in commercial items are not related to funding under the applicable contract clauses (DFARS 252.227-7015) unless made so under a commercial technical data license, the Government is not being improperly restricted by these clauses even where it overcomes this presumption unless the commercial technical data license provides funding a basis for such change. The existing DFARS 252.227-7037 clause does not reflect this situation.

Also on the topic of commercial items, The Panel received an industry comment relating to 10 U.S.C. § 2321(f). This provision requires that commercial technical data be subject to a complex presumption-switching process in which a presumption of private expense varies

according to how (and at what level of the supply chain) an item is procured. The comment contended that commercial item vendors are exposed to a more complex validation scheme under DFARS 252.227-7017 and 252.227-7019 than non-commercial vendors since, in the implementation, these new requirements are copied directly into the contract clauses.

Industry further recommended modifying 10 U.S.C. 2320 and 2321 to exclude any mention of commercial items or, at the very least, restore the presumption that all commercial items are developed exclusively at private expense and make clear that modifications to commercial items may not be used as the basis for rebutting the presumption of development exclusively at private expense for so long as the modified item qualifies as a commercial item in accordance with 41 U.S.C. 103. The Panel did not reach a consensus on the advisability of changes the statute.

The Panel received industry comments regarding the new provision in 10 U.S.C. 2321 (d)(2)(iv), which allows challenges at any time for "fraudulently asserted use or release restriction." The existing DFARS guidance is based on presumptions more applicable to contract breaches, whereas claims involving fraud are normally plead with particularity (see, e.g., FRCP 9(b)) and to use a clear and convincing evidence. As such, the comment suggested that, in the unique case of fraud, that the DFARS guidance ensure that the contracting officers are aware of the heightened pleading and evidentiary requirements for fraud.

The Panel received industry comments regarding confusion between the data assertion list update process in DFARS 252.227-7013 and 252.227-7014, and the challenge process for delivered data in DFARS 252.227-7037 and 252/227-7019. The contractor's ability to add new assertions to an assertion list under DFARS 252.227-7013 and 252.227-7014 is governed by a separate process which does not affect the Government's ability to challenge the data on delivery.

The Panel received industry comments that the existing prechallenge request for information in DFARS 252.227-7013 and 252.227-7014 is problematic since the request does not require identification of specific issues to which the contractor should respond. In order to be meaningful, the commend indicated that the contracting officer should at least provide, for each challenged piece of data for which the contracting officer is requesting information, the factual basis for the contracting officer's issues for that piece of technical data.

The Panel also received an industry comment about the timing of the written challenge notification in DFARS 252.227-7037(e). Under this process, the contractors must respond within 60 days to support the restriction's validity on receipt of the written challenge. In contrast, the contracting officer has no time limit for issuing a written challenge after the contractor response to a prechallenge request for information under DFARS 252.227-7037(d). According to the comment, 60 days is not an adequate time to justify an assertion where such assertions are often based on items developed years or decades earlier than the written challenge notification, which makes finding the evidence of development and financial records difficult to locate and integrate into a contractor's response. The Panel notes that the existing DFARS

252.227-7037(e)(iv)(2) does give the contracting officer discretion to extend the time period. DFARS 252.227-7019 has a similar process. Further, the contractor often will need to keep records for correcting the data under DFARS 252.246-7001, which would indicate that this issue is less acute where written challenges are presented earlier.

The Panel received comments from Government representatives that the validation process may be too cumbersome and therefore does not lead to meaningful caselaw. The comment did not make a specific suggestion, or indicate that other claims processes (including the Contract Disputes Act process) would be preferable. Such a change would require a change to the 10 U.S.C. 2321. Further, this comment about a lack of case law is similar to that of alternative dispute resolution processes, which is analogous to the validation process. It is also unclear as to whether the timing of the validation process contributes to the lack of caselaw. The Panel did not reach a consensus on the advisability of changes the statute.

Recommendation: Detailed recommendation limited to 2 pages *(Include any express changes to 2320 or 2321)*

The Panel did not reach a consensus on any changes to 10 U.S.C. 2320 or 2321.

The Panel does recommend changes be made to the DFARS to bring it into alignment with the commercial technical data license under DFARS 252.227-7015

DFARS 227.7103-13 Government right to review, verify, challenge, and validate asserted restrictions.

(c) Challenge considerations and presumption.

(1) Requirements to initiate a challenge. Contracting officers shall have reasonable grounds to challenge the validity of an asserted restriction. Before issuing a challenge to an asserted restriction, carefully consider all available information pertaining to the assertion. Where such challenge is based on a fraudulently asserted use or release restriction, the contracting officer will consult with agency IP counsel ensure such reasonable grounds include particular facts showing fraud, and clear and convincing evidence of the same. The contracting officer shall not challenge a contractor's assertion that a commercial item was developed exclusively at private expense unless the Government can demonstrate that it contributed to development of that item and private expense was a basis for changing the Government's license rights in the technical data. The presumption does not affect the Contracting Officer's ability to challenge a restriction where the restrictions is contrary to the Government's rights in the technical data specified DFARS 252.227-7015 or any commercial license for the technical data.

DFARS 252.227-7013 Rights in technical data—Noncommercial items.

(e) Identification and delivery of data to be furnished with restrictions on use, release, or disclosure. (1) This paragraph does not apply to restrictions based solely on copyright.

…
(4) When requested by the Contracting Officer, the Contractor shall provide sufficient information to enable the Contracting Officer to evaluate whether the Contractor's claim that the new assertions are based on new information or inadvertent omissions unless the inadvertent omissions would have materially affected the source selection decision. The Contracting Officer reserves the right to add the Contractor's assertions to the Attachment and validate any listed assertion, at a later date, in accordance with the procedures of the Validation of Restrictive Markings on Technical Data clause of this contract.

DFARS 252.227-7014 Rights in noncommercial computer software and noncommercial computer software documentation

(e) Identification and delivery of computer software and computer software documentation to be furnished with restrictions on use, release, or disclosure. (1) This paragraph does not apply to restrictions based solely on copyright.
…
(4) When requested by the Contracting Officer, the Contractor shall provide sufficient information to enable the Contracting Officer to evaluate whether the Contractor's assertions claim that the new assertions are based on new information or inadvertent omissions unless the inadvertent omissions would have materially affected the source selection decision. The Contracting Officer reserves the right to add the Contractor's assertions to the Attachment and validate any listed assertion, at a later date, in accordance with the procedures of the Validation of Asserted Restrictions—Computer Software clause of this contract.

DFARS 252.227-7019 Validation of asserted restrictions—Computer software.
…

(d) Requests for information. (1) The Contracting Officer may request the Contractor to provide sufficient information to enable the Contracting Officer to evaluate the Contractor's asserted restrictions. Such information shall be based upon the records required by this clause or other information reasonably available to the Contractor. The contracting officer's request shall include the specific item or items of computer software for which the validity is being questioned, and any factual basis for questioning the validity of the particular restriction.

(f) Challenge procedures. (1) A challenge must be in writing and shall—

…

(ii) Require the Contractor to respond within sixty (60) days where the written challenge notice is received during the warranty period in DFARS 252.246-7001 of this contract; and one hundred twenty (120) days or longer as agreed upon by the parties if the written challenge notice is received after the warranty period;

DFARS 252.227-7037 Validation of restrictive markings on technical data.

(b) *Presumption regarding development exclusively at private expense*—(1) *Commercial items.* (i) Except as provided in paragraph (b)(2) of this clause, the Contracting Officer will presume that the Contractor's or a subcontractor's asserted use or release restrictions with respect to a commercial item is justified on the basis that the item was developed exclusively at private expense.

(ii) The Contracting Officer will not challenge such assertions unless the Contracting Officer has information that demonstrates that the commercial item was not developed exclusively at private expense where such information changes the Government's rights in the technical data under DFARS 252.227-7015. The presumption does not affect the Contracting Officer's ability to challenge a restriction where the restrictions is contrary to the Government's rights in the technical data under DFARS 252.227-7015 or any commercial license for the technical data.

(2) *Major weapon systems.* In the case of a challenge to a use or release restriction that is asserted with respect to commercial technical data of the Contractor or a subcontractor for a major weapon system or a subsystem or component thereof on the basis that the major weapon system, subsystem, or component was developed exclusively at private expense—

(i) The presumption in paragraph (b)(1) of this clause applies to—

(A) A commercial subsystem or component of a major weapon system, if the major weapon system was acquired as a commercial item in accordance with DFARS subpart 234.70 (10 U.S.C. 2379(a));

(B) A component of a subsystem, if the subsystem was acquired as a commercial item in accordance with DFARS subpart 234.70 (10 U.S.C. 2379(b)); and

(C) Any other component, if the component is a commercially available off-the-shelf item or a commercially available off-the-shelf item with modifications of a type customarily available in the commercial marketplace or minor modifications made to meet Federal Government requirements; and

(ii) In all other cases, where such information changes the Government's rights in the technical data under DFARS 252.227-7015, the challenge to the use or release restriction will be sustained unless information provided by the Contractor or a subcontractor demonstrates that the item or process was developed exclusively at private expense. The presumption of lack of a presumption under this provision does not affect the Contracting Officer's ability to challenge a restriction where the restrictions is contrary to the Government's rights in the technical data under DFARS 252.227-7015 or any commercial license for the technical data.

(iii) When providing a prechallenge request for information or written challenge notice to a contractor for commercial technical data for the a commercial subsystem or component of a commercial major weapon system; a component of a commercial subsystem used in the major weapon system, or where any other commercial component used in a major weapon system, the contracting officer shall include a finding as to which presumption in (b)(2) of this clause does or does not apply under this section, and the facts which support this finding.

(d) Prechallenge request for information. (1) The Contracting Officer may request the Contractor or subcontractor to furnish a written explanation for any restriction asserted by the Contractor or subcontractor on the right of the United States or others to use technical data. The contracting officer's request shall include the specific item or items of technical data for which the validity is being questioned, and any factual basis for questioning the validity of the particular restriction. If, upon review of the explanation submitted, the Contracting Officer remains unable to ascertain the basis of the restrictive marking, the Contracting Officer may further request the Contractor or subcontractor to furnish additional information in the records of, or otherwise in the possession of or reasonably available to, the Contractor or subcontractor to justify the validity of any restrictive marking on technical data delivered or to be delivered under the contract or subcontract (e.g., a statement of facts accompanied with supporting documentation). The Contractor or subcontractor shall submit such written data as requested by the Contracting Officer within the time required or such longer period as may be mutually agreed.

(e) Challenge. (1) Notwithstanding any provision of this contract concerning inspection and acceptance, if the Contracting Officer determines that a challenge to the restrictive marking is warranted, the Contracting Officer shall send a written challenge notice to the Contractor or subcontractor asserting the restrictive markings. Such challenge shall—

…

(ii) Require a response within sixty (60) days justifying and providing sufficient evidence as to the current validity of the asserted restriction where the written challenge notice is received during the warranty period in DFARS 252.246-7001 of this contract; and one hundred twenty (120) days or longer as agreed upon by the parties if the written challenge notice is received after the warranty period;

Cross-reference to other Tension Points:

4iv. Funding test for rights: is it the correct test or is there a less complex alternative?
4v. Commercial items vs noncommercial items
5k. Segregation "at the clause level"—applying non-commercial clauses to commercial TD/CS.
6d. Data assertion list (7017) – burden on contractor to prepare/Government to receive versus benefit to Government; confusion over lists lead to contract delays.

DRAFT
Government-Industry Advisory Panel
Tension Point Development

Original Title: *(6)(a) How to keep CDRL deliverable up-to-date.*
Authors: *James McEwen*

Tension Point: An emphasis on ordering data for purposes of maintenance and sustainment must also account for keeping that data current

Issue:

The Panel has received government comments about the need to ensure it receives a complete technical data and software data package for purposes of long term sustainment and maintenance. The Panel received comments from the Defense Logistics Agency, as well as aftermarket support providers, that the lack of data is a factor in sole sourcing such long term sustainment and maintenance to the component OEM. While it is clear that a failure to order data and a lack of data rights in delivered data could inhibit long term sustainment and maintenance using third parties or manufacturing spare parts, the Panel also received information from government and industry that the lack of current data is as big a factor as the lack of data itself. In essence, if the Government orders data needed for sustainment, the Government needs to account for that data going stale and needing to be updated to reflect changes in the component.

The Panel also notes that an industry standard for maintaining data current is through use of subscription agreements. Such agreements are common for data libraries, including for industry standards. Currently, the Panel is not aware of any DFARS direction on how to keep maintenance data current other than to order it from the component OEM or attempt to reverse engineer the latest component configuration to get this new data.

Recommendation:

The Panel does not recommend any changes to 10 U.S.C. 2320 or 2321.

The Panel recommends that the following changes be made to the DFARS

227.7103-2 Acquisition of technical data.

(b)(1) The contracting officer ~~Data managers~~ shall consult with the program and ~~or~~ other requirements personnel to, in accordance with an IP Strategy, identify~~are responsible for identifying~~ the Government's minimum needs for technical data in the specific procurement. Data needs must be established giving consideration to the contractor's economic interests in data pertaining to items, components, or processes that have been developed at private expense; the Government's costs to acquire, maintain, store, retrieve, and protect the data; reprocurement needs; repair, maintenance and overhaul philosophies; spare and repair part considerations; and whether procurement of the items, components, or processes can be accomplished on a form, fit, or function basis. When it is anticipated that the Government will obtain unlimited or government purpose rights in technical data that will be required for competitive spare or repair parts procurements, such data should be identified as deliverable data items and tracked using the Data Manager, and the program shall ensure the IP Strategy incorporates a mechanism to maintain and update the data items. Requirements personnel should

consider use of data access or subscription agreements as a mechanism to maintain and update the data items for future needs. Reprocurement needs may not be a sufficient reason to acquire detailed manufacturing or process data when items or components can be acquired using performance specifications, form, fit and function data, or when there are a sufficient number of alternate sources which can reasonably be expected to provide such items on a performance specification or form, fit, or function basis.

227.7203-2 Acquisition of noncommercial computer software and computer software documentation.

(b)(1) The contracting officer shall consult with the program and ~~Data managers or~~ other requirements personnel to, in accordance with an IP Strategy, identify ~~are responsible for identifying~~ the Government's minimum needs in the specific procurement. In addition to desired software performance, compatibility, or other technical considerations, needs determinations should consider such factors as multiple site or shared use requirements, whether the Government's software maintenance philosophy will require the right to modify or have third parties modify the software, and any special computer software documentation requirements. Where the Government's software maintenance philosophy may include modifications to the software, the Data Manager will need to establish a configuration management plan with the program and ensure the IP Strategy incorporates a mechanism to ensure any Government modified software is coordinated with the software author where the software author will be providing updates and warranty updates on the software. Requirements personnel should consider use of data access or subscription agreements as a mechanism to maintain and update the data items for future needs.

227.7202-5 Contract clause for software subscription or software as a service agreements.

Formatted: No underline

A specific contract clause governing the Government's rights in software subscription or software as a service agreements is not prescribed. As required by 227.7202-3, the Government's rights to use, perform, display, or disclose computer software or computer software documentation obtained under a subscription or service agreement shall be identified in a license agreement.

The Panel further recommends DoD Instruction 5000.02 be updated to incorporate consideration of subscription agreements and software as a service agreements in the IP Strategy

(4) Intellectual Property (IP) Strategy and Open Systems Architectures. Program management must establish and maintain an IP Strategy to identify and manage the full spectrum of IP and related issues (e.g., technical data and computer software deliverables, patented technologies, and appropriate license rights) from the inception of a program and throughout the life cycle. The IP Strategy will describe, at a minimum, how program management will assess program needs for, and acquire competitively whenever possible, the IP deliverables and associated license rights necessary for competitive and affordable acquisition and sustainment over the entire product life cycle, including by integrating, for all systems, the IP planning elements required by subpart 207.106 (S-70) of the Defense Federal Acquisition Regulation Supplement (Reference (al)) for major weapon systems and subsystems thereof. The IP Strategy will be updated throughout the entire product life cycle, initially as part of the Acquisition Strategy, and during the Operations and Support Phase as part of the Life-Cycle Sustainment Plan. Program management is also responsible for evaluating and implementing open systems architectures, where cost effective, and implementing a consistent IP Strategy. This approach integrates

technical requirements with contracting mechanisms and legal considerations to support continuous availability of multiple competitive alternatives throughout the product life cycle.

The IP Strategy will appoint a specific person in the program who will be responsible for the IP Strategy and Open Systems Architectures. The IP Strategy will account for total life cycle costs in its acquisition or data items, have contingency plans for changes in sustainment philosophies, and account for potential reductions in competition caused by large upfront data demands in a particular procurement. The IP Strategy will further document a sustainment strategy for the program, including, for each component, which will be maintained at a depot performed solely by Government personnel, which components will be supported by a contractor either directly or under the direction of the depot, when such sustainment will begin, the method by which received data items are maintained and kept up to date as the component is updated, and what transition assistance is needed presently or in the future should the component OEM no longer support the component. The IP Strategy should consider, as tools, priced options, specifically negotiated licenses, escrow or other deferred delivery requirements, data subscription agreements, reverse engineering, second sourcing mechanisms, and non-DFARS agreements such as other transactions or public private partnerships. A best practice is for the program to review the IP Strategy with the major system, major subsystem, or component manufacturer to determine which tool is most likely to achieve a cost effective solution while encouraging competition at the major system, major subsystem, and component levels for maintenance and spare part procurement phases.

Cross-reference to other Tension Points:

2d. What is necessary to comply with 2320(e)(3)'s requirement to address TD (and CS) needs in view of potential changes to sustainment strategy.
2e. Access for limited purposes (cyber review; airworthiness; approvals) versus delivery as a CDRL under DFARS.
4bi. Commercial software terms versus Government-unique requirements.
5f. Rigid IP requirements versus need for flexible arrangements.
6c. Lack of trained personnel (e.g. IP strategy; draft SNLs; DFARS 227.7103-1; IP valuation; use of CDRLs related to data)
7e. Failure to define and order CDRLs/reliance on deferred ordering and DAL to obtain data (Already covered, possibly repetitive).

DRAFT

Government-Industry Advisory Panel
Tension Point Development

Original Title: *6(b) Small Business Innovation Research (SBIR) – flow down to suppliers; inability to share with primes; how evaluated.*

Authors: *Alison Brown, NAVSYS Corporation*

Tension Point: Small Business Innovation Research (SBIR) Mandatory Data Rights provisions for Phase III (non-SBIR funded) Contracts or Subcontracts

Issue: Overview of the tension point

Section 2320 of title 10, U.S.C., states that the establishment of any rights in technical data should include consideration of the Small Business Innovation Development Act of 1982 (15 U.S.C. 638 note), and the Small Business Act (15 U.S.C. 631). This legislation established the Small Business Innovation Research (SBIR) program with the purpose of strengthening the role of small, innovative firms in federally funded research and development. Small business DoD contractors are rewarded for their innovation and invention in the SBIR program by receiving a special class of SBIR technical data rights, delineated for DoD contracts in DFARS 252.227-7018[1]. SBIR technical data rights apply to all SBIR awards, including subcontracts to such awards, that fall within the statutory definition of Phase I, II, or III of the SBIR Program.

15 U.S.C. 638(e)(4)(C) states that a Phase III award is one that: *derives from, extends, or completes efforts made under prior funding agreements under the SBIR program—*

(i) in which commercial applications of SBIR-funded research or research and development are funded by non-Federal sources of capital or, for products or services intended for use by the Federal Government, by follow-on non-SBIR Federal funding awards; or

(ii) for which awards from non-SBIR Federal funding sources are used for the continuation of research or research and development that has been competitively selected using peer review or merit-based selection procedures.

Phase III work is typically oriented towards commercialization of SBIR research or technology and may be either a competitive or non-competitive award of a contract, or a subcontract, to a small business. SBIR data rights clauses are non-negotiable and must not be the subject of negotiations pertaining to an SBIR Phase III award, or diminished or removed during award administration[2].

In the government-industry panel deliberations and in comments provided by small businesses to the panel, the following tension points were raised which related to follow-on "Phase III" awards where SBIR data rights clauses would apply.

[1] https://www.gpo.gov/fdsys/pkg/CFR-2009-title48-vol3/pdf/CFR-2009-title48-vol3-sec252-227-7018.pdf
[2] https://www.sbir.gov/about/about-sbir#sbir-policy-directive

Flow-down of data rights clauses from prime contractors to suppliers

When prime contractors elect to make a subcontract award to a small business supplier, if the award would "*derive from, extend, or complete efforts made under prior funding agreements under the SBIR program"* then the subcontract would be considered a Phase III award and the law requires that the SBIR data rights clause (DFARS 252.227-7018) must be included in the subcontract. This creates an issue if there is a mandatory flow-down of Government Purpose Rights (GPR) data rights from the prime contractor (see Tension Point 5. j. Mandatory flow-down) as SBIR data rights are non-negotiable, even if the prime contract includes non-SBIR data rights clauses (DFARS 252.227-7013[3] and 252.227-7014[4]).

Restrictions on sharing of SBIR technical data with primes

While SBIR technical data rights allow the Government to use technical data for Government purposes, to protect the competitive interests of the small business, there are restrictions on the disclosure of this data outside of the Government, including disclosure for procurement purposes (FAR 52.227-20[5]). A tension point was raised that this restriction made it difficult for the Government to share technical SBIR data with their primes for evaluation of whether the innovations developed by the small business could be leveraged within a program of record.

Inclusion of data rights evaluation in consideration of awards for SBIR Phase III work

In a competitive solicitation, SBIR data rights accord to any contract that would be considered an SBIR Phase III, even if the solicitation provides for other rights. By law, an agency must not, in any way, make issuance of an SBIR Phase III award conditional on data rights. If the SBIR awardee wishes to transfer its SBIR data rights to the awarding agency or to a third party, it must do so in writing under a separate agreement. A decision by the awardee to relinquish, transfer, or modify in any way its SBIR data rights must be made without pressure or coercion by the agency or any other party. If a prime contractor proposes use of an SBIR developer as a subcontractor, the law would prohibit inclusion of SBIR data rights as a factor in the evaluation of the prime contractor. Similarly, small businesses pointed to issues when a competitive solicitation, such as a BAA, required delivery with unlimited data rights (e.g. DFARS 252.227-7013). If their proposed approach would be considered a Phase III effort then the law requires that issuance of a contracts could not be conditioned on relinquishing SBIR data rights. Any other data rights agreement must be entered into only after the SBIR Phase III award, which includes the appropriate SBIR data rights clause, has been signed.

[3] https://www.gpo.gov/fdsys/pkg/CFR-2011-title48-vol3/pdf/CFR-2011-title48-vol3-sec252-227-7013.pdf
[4] https://www.gpo.gov/fdsys/pkg/CFR-2011-title48-vol3/pdf/CFR-2011-title48-vol3-sec252-227-7014.pdf
[5] FAR 52.227-20: https://www.acquisition.gov/?q=/browse/far/52

DRAFT

Government-Industry Advisory Panel

Tension Point Development

Recommendation: Detailed recommendation limited to 2 pages *(No changes to 2320 or 2321)*

Flow-down of data rights clauses from prime contractors to suppliers

In tension point 4. b. there is a discussion on recommendations on how to consider data rights solutions in relation to program needs, in particular for life cycle support. In the Department of Navy SBIR and STTR Phase III Guidebook[6], there is a comprehensive discussion on how SBIR/STTR technology can be used to realize SBIR/STTR technology use to realize mission cost savings and technology objectives, and recommended approaches for SBIR/STTR inclusion in program planning and management over program life cycles. This provides guidance to acquisition personnel on frequently asked questions about SBIR/STTR data rights. Some of the specific recommendations that address tension points raised during panel discussions are summarized below. The panel recommends that DoD develop similar agency-wide guidance for acquisition personnel to clarify implementation of SBIR policy within programs.

Q: How to handle Subcontracting to a Small Business from Large Business if the prime contractor has an obligation to deliver unlimited or government purpose data rights?

A: Under the prime contract, the prime contractor may still deliver SBIR/STTR data rights based on the rights asserted from an SBIR/STTR Phase III subcontract. The prime contractor provides notice to the Government that more restricted (SBIR/STTR) data are being delivered under the prime contract than Unlimited, Unrestricted, or Government Purpose rights by filling out the four-column charts listed in DFARS clauses 252.227-7013(e)(3)[7], 252.227- 7014(e)(3)[8], or 252.227-7017(d)[9]. The charts in all of these clauses call for identifying the SBIR/STTR data to be delivered, asserting that the basis for the SBIR/STTR rights is the SBIR/STTR clause, asserting that SBIR/STTR data rights will be delivered, and providing a contact name for the subcontractor.

Q: Do SBIR/STTR data rights make it difficult to get out of an SBIR/STTR engagement?

A: No - you can conduct a competition using a performance-based specification and not using the SBIR/STTR Technical Data Package to predefine a specific implementation. A build-to-print award is not allowed unless agreed to by the SBIR/STTR company within five years or can be open beyond five years upon completion of the project. One can develop a second source for production competition by paying the SBIR/STTR company to qualify a second source similar to what has been done by a large business, to keep prices low or to ensure a surge production capacity. Creative methods for introducing competition include (1) selecting a second source and paying the SBIR/STTR company to qualify them, and (2) having the SBIR/STTR company find and qualify a second source and then compete between the SBIR/STTR and the second source in 50-50 or 60-40 splits based on price and performance.

Q: What happens if the Government is not happy with the performance of the company?

A: The company should be treated like any poor performing contractor: document the problem and terminate the contract if not resolved. The Contractor Performance Assessment Reporting System (CPARS, at www.cpars.gov) applies to Phase III contracts. Cost, schedule, and performance are all measures applied to SBIR/STTR contracts. In the event of contract termination or follow-on award to another company, SBA should be notified and a justification provided, following a procedure detailed in the aforementioned Policy Directives[2].

---

[6] http://www.secnav.navy.mil/smallbusiness/Documents/DON%20SBIR_STTR%20Guidebook_09.16.2014%20final.pdf

[7] https://www.gpo.gov/fdsys/pkg/CFR-2011-title48-vol3/pdf/CFR-2011-title48-vol3-sec252-227-7013.pdf

[8] https://www.gpo.gov/fdsys/pkg/CFR-2011-title48-vol3/pdf/CFR-2011-title48-vol3-sec252-227-7014.pdf

[9] https://www.gpo.gov/fdsys/pkg/CFR-2011-title48-vol3/pdf/CFR-2011-title48-vol3-sec252-227-7017.pdf

Restrictions on sharing of SBIR technical data with primes

During the SBIR data rights protection period, the SBIR Policy Directive § 8(b)(2) requires agencies protect from disclosure and nongovernmental use all SBIR technical data developed from work performed under an SBIR funding agreement unless, subject to paragraph (b)(3), the agency obtains permission to disclose such SBIR technical data from the awardee or SBIR applicant. DFARS 252.227-7018 provides five years of data rights protection for SBIR/STTR data from the date of the last contract deliverable. This data rights protection period will be extended if the SBIR/STTR data is protected and referenced under a subsequent SBIR/STTR contract. Release to prime contractors can be handled, with the permission of the SBIR awardee, and protected through the a Use and non-disclosure agreement in accordance with DFARS 227.7103-7(c). Section (1)(a) of this clause specifically addresses protection of data marked with SBIR data rights legends. We recommend providing agency-wide guidance on adopting procedures in accordance with DFARS 227.7103 to clarify appropriate methods for handling the release of SBIR technical data to primes for the allowed government purposes included in DFARS 252.227-7018.

Inclusion of data rights evaluation in consideration of awards for SBIR Phase III work

By law, an agency must not, in any way, make issuance of an SBIR Phase III award conditional on relinquishing data rights. Moreover, in the FY 2012 NDAA[10], special acquisition preference was clarified for SBIR/STTR and goals were set for SBIR-STTR Technology Insertion. As a result, USD(AT&L) Memo "Implementation Directive for Better Buying Power 2.0 (24 APR 2013)"[11] and DoDI 5000.02 issued direction for program managers with contracts with a value at or above $100 million to establish goals for the transition of Phase III technologies in subcontracting plans and require primes to report the number and dollar amount of Phase III SBIR or STTR contracts.

Under direction from ASN(RDA)[12] the Navy requires PEO-level formulation of a Small Business strategy, with DPM support as "… the Small Business Advocate responsible for identifying opportunities within the program for Small Business participation..". The DON Phase III Guidebook includes examples of SBIR/STTR incentives that KOs and/or CORs may use in supporting PMs, PEOs, and CAEs in responding to these requirements, and includes candidate language for inclusion in Sections C, I, L, and M of an RFP. The panel recommends that DoD issue similar agency-wide direction to ASN(RDA) for designation of a Small Business Advocate within each program responsible for expanding the inclusion of SBIR/STTR technologies in acquisition programs.

[10] In 2010, SBIR/STTR reauthorization extended the program first enacted in 1982 through 2017 via the 2012 National Defense Authorization Act. Section 5001 Division E of FY 2012 NDAA SBIR/STTR Reauthorization: Section 5108(4) – SBIR-STTR Special Acquisition Preference, Section 5122 – Goal for SBIR-STTR Technology Insertion, and Section 5138 – Technology Insertion Reporting Requirements.
[11] USD(AT&L) *Better Buying Power 3.0 Guidance and Actions* (9 April 2015).
[12] ASN(RDA); *Tapping Into Small Business in a Big Way* (12 JAN 2015)

Cross-reference to other Tension Points:

- 3. a. Data rights as an evaluation factor.
- 4. b. Rights in relation to needs.

i. Commercial software terms versus Government-unique requirements.
ii. Authorized release and use of limited rights TD (two different points).
iii. Balance need for rights in IP versus need for competition.
iv. Are existing rights sufficient for depot, or is there a need for depot-specific, service specific, and program specific licenses.

- 5. j. Mandatory flow-down (commercial subs and suppliers).
- 9. b. Complexity of the IP scheme versus ability of commercial and small businesses to comply (SEC 809)

Government Industry Advisory Panel
Tension Point – Lack of Trained Government Personnel

Original Title: 6. C. Lack of Trained Personnel

Authors: Theodora S. Hancock

Tension Point:
Generally, Government program managers (PMs), engineers, contracting officers (COs), requirements and logistics officers - do not possess sufficient knowledge and skills regarding the management of Technical Data and Computer Software Rights. Acquisition professionals do not receive adequate, if any, training in this area, therefore, they may not be able to define government needs for life cycle sustainment when their leverage is most practical – in the early phases of a program. As a result, they request Unlimited or Government Purpose Rights, even when the acquisition does not fully warrant access to that level of technical data or computer software.

Issue:

Policy - It is DoD policy (DFARS 227.7103-1) to acquire only the technical data, and the rights in that data, necessary to satisfy agency needs. Solicitations and contracts must (1) Specify the technical data to be delivered under a contract and the delivery schedules for the data; (2) Establish or reference procedures for determining the acceptability of technical data; (3) Establish separate contract line items, to the extent practicable, for the technical data to be delivered and require offerors and contractors to price separately each deliverable data item; and (4) Require offerors to identify, to the extent practicable, technical data to be furnished with restrictions on the Government's rights and require contractors to identify technical data to be delivered with such restrictions prior to delivery.

Reality - Anecdotal evidence indicates that DoD has not always developed a viable Intellectual Property strategy for its acquisitions and government requirements for technical data and software are not precisely defined by the acquisition personnel assigned to execute the program. This is due partly to the dynamic, uncertain nature of the defense realm and partly to the acquisition personnel's inability to "predict" the future in order to determine exactly what technical data they will need and exactly when they will need it. (What exactly will we need five, ten or more years into the future to sustain the program and when exactly will we need it?) In addition to the difficulty of accurately estimating our future technical data requirements, acquisition personnel across most disciplines of "A" lack basic training and in depth understanding of this discipline. Thus, acquisition personnel opt to acquire as much data

and software as they can, in the early phase of the program – prior to contract award - while DoD still has considerable leverage and insight into its investment - even if all the data will not be needed until later in the sustainment phase of the program or at any time in the future.

Experience indicates that when DoD acquired less than Government Purpose Rights in technical data for its weapon systems, and later modified its acquisition/sustainment strategy, it faced major obstacles in obtaining, at a reasonable cost, the data rights necessary to sustain the system, e.g. F-35 JSF Program.

Summary -

1. Requirements owners/generators do not, typically, possess sufficient knowledge to accurately assess future government requirements therefore the default position is to request "everything".
    a. The dynamic, uncertain realm in which DoD operates complicates this further.
    b. It is difficult for DoD to assess its future data and software needs in the early phase of the program but the market forces compound the problem if DoD defers the decision for data until the later phases of the program.
2. At times, COs may not negotiate the appropriate data rights into their contracts, or do not address them appropriately because the requiring activity has not requested the data or has not provided sufficient supporting information.
3. Even when COs include data rights requirements in the contract, they do not always address them in the CDRLs; therefore, DoD does not receive delivery of the required data.

Recommendation:

To ameliorate the situation, we recommend a two-prong approach to be addressed in legislation **(1) Require/Provide additional training for acquisition personnel and (2) Develop a Cadre of Subject Matter Experts.**

1. **Require/Provide mandatory training for acquisition personnel assigned to specific programs**
    a. To raise the awareness level and enhance knowledge, ensure all program managers (PMs), engineers, requirements owners (ROs), contracting officers (COs) and logistics officers receive "Just-in-Time" specialized training on technical data and computer software rights, prior to assigning them responsibilities in acquisitions which require technical data and software rights.

b. Make technical data and software rights one of the "core" subjects required prior to certification of Level III PMs, and COs and Core Plus - Life Cycle Logistics.

2. Develop a cadre of Subject Matter Experts (SMEs)

a. The cadre should consist of SMEs from the world of requirements generators - those who understand the requirements and potential future needs, from contracting, logistics and legal.
b. Similarly to Peer Reviews, the individuals selected for this assignment should be fairly senior individuals, with broad-based knowledge of their particular field. They should possess considerable experience across "Acquisition", and should have completed training and obtained experience in the management of data rights.
c. This assignment need not be a full-time duty. Initially, it can be handled as an additional duty in the same manner we handle the DoD Peer Reviews and the Air Force Multifunctional Independent Review Teams (MIRTS).
d. Although these experts may be assigned to their respective agencies, the tasking to help formulate and review Intellectual Property strategy of major systems and appropriate services acquisitions should come from a centralized location at the Office of the Secretary of Defense, e.g. DPAP. This scheme will enable a smaller cadre of individuals to cover a greater number of programs and will eventually standardize, to the degree possible, the DoD requirements for technical data rights and software for our weapons systems and related services.

Neither of these recommendations are a panacea but jointly they could go a long way in improving the present situation.

Cross-Reference to Other Points:

This issue would greatly impact several other "tension points" such as Tension Point 2 – Acquisition Planning and Requirements, Tension Point 3 - Source Selection Concerns, and Tension Point 5 – Implementation Concerns.

Attachment: Proposed Legislation

SEC. XXXXX MANDATORY REQUIREMENT FOR TRAINING RELATED TO TECHNICAL DATA AND COMPUTER SOFTWARE RIGHTS AND INTELLECTUAL PROPERTY

(a) MANDATORY TRAINING FOR TECHNICAL DATA AND COMPUTER SOFTWARE RIGHTS - Section xxxx of title XX, United States Code, is amended by adding the following new subsection:

(xx) TECHNICAL DATA AND COMPUTER SOFTWARE RIGHTS AND INTELLECTUAL PROPERTY TRAINING REQUIRED - The Secretary of Defense shall provide mandatory training for members of the Defense Acquisition workforce and employees of the Department of Defense responsible for the acquisition of defense articles and commercial items.

(xx). Such mandatory training shall, at a minimum:

(1) provide comprehensive information on the subject, the function and the impact of technical data and computer software rights and intellectual property in the acquisition of defense articles and commercial items;

(2) teach best practices for recognizing the need to address technical data and computer software rights prior to issuance of the requirements documents and prior to the issuance of the Request for Proposals;

(3) provide methodologies for more accurate estimating needs for data rights for the sustainment phase of a program;

(4) standardize development of the Intellectual Property Strategy across the Department.

(b) INCORPORATION INTO PROGRAM MANAGEMENT AND CONTRACT MANAGEMENT CERTIFICATION

Members of the Defense Acquisition Workforce and employees of the Department of Defense must receive the appropriate training prior to an assignment to an acquisition coded position and before they are certified Level III for Program Management and Contract Management.

SEC. XXX REQUIREMENT TO ESTABLISH A CADRE OF SUBJECT MATTER EXPERTS REGARDING TECHNICAL DATA AND COMPUTER SOFTWARE RIGHTS AND INTELLECTUAL PROPERTY

(a) ESTABLISHMENT OF CADRE OF SMEs IN TECHNICAL DATA AND COMPUTER SOFTWARE RIGHTS - The Secretary of Defense shall establish a cadre of Subject Matter Experts (SMEs) within the Department of Defense who will provide advice and expertise in the planning and estimating of requirements regarding technical data and computer software rights for defense acquisitions of defense articles and commercial items.

(xx) This cadre will be established within one calendar year from the effective date of this authorization.

(b) REPORT TO CONGRESS
Upon implementation of the above requirement, and no later than a year from the date of this authorization, the Secretary of Defense shall provide a report to Congress notifying them of the establishment of the cadre of SMEs.

DRAFT

Government-Industry Advisory Panel
Tension Point Development

Original Title: *(8)(c) Open interfaces versus preference for industry standards*

Authors: *Bill Elkington and Jim McEwen*

Tension Point: There is a strong preference for commercial standards, which are most often voluntary consensus standards, in both Executive Branch policy and in the FY17 NDAA, yet sometimes in design requirements and data rights requirements provided by DoD, the preference has been to create DoD-unique interfaces and for DoD to obtain GPR or Unlimited Rights to these interfaces in major weapons systems.

Issue: OMB Circular A-119 "Federal Participation in the Development and Use of Voluntary Consensus Standards and in Conformity Assessment Activities" was revised and reissued on January 27, 2016. It "…directs agencies to use standards developed or adopted by voluntary consensus standards bodies rather than government-unique standards, except where inconsistent with applicable law or otherwise impractical." The reasons given in the circular itself are the following:

1. "Eliminating the cost to the Federal government of developing its own standards and decreasing the cost of goods procured and the burden of complying with agency regulation;
2. Providing incentives and opportunities to establish standards that serve national efficiency, economic competition, and trade; and
3. Furthering the reliance upon private sector expertise to supply the Federal government with cost-efficient goods and services.

In two sections of the FY17 NDAA, DoD is directed to use widely supported consensus-based standards. The first section of the law relevant to this discussion is Section 805 "Modular Open System Approach in Development of Major Weapon Systems." The first reference in Section 805 is the following:

"(e) Milestone B.—A major defense acquisition program may not receive Milestone B approval under section 2366b of this title until the milestone decision authority determines in writing that—

"(1) In the case of a program that uses a modular open system approach—

"(A) The program incorporates clearly defined major system interfaces between the major system platform and major system components, between major between major system components, and between major system platforms;

"(B) Such major system interfaces are consistent with the widely supported and consensus-based standards that exist at the time of the milestone decision, unless such standards are unavailable or unsuitable for particular major system interfaces; and

"(C)The Government has arranged to obtain appropriate and necessary intellectual property rights with respect to such major system platform;"

The second relevant section in Section 805 is the following: "The Secretary of each military department shall—

> "(1) Coordinate with the other military departments, the defense agencies, defense and other private sector entities, national standard-setting organizations, and, when appropriate, with elements of the intelligence community with respect to the specification, identification, development, and maintenance of major system interfaces and standards for use in major system platforms, where practicable;
> "(2) Ensure that major system interfaces incorporate commercial standards and other widely supported consensus based standards that are validated, published, and maintained by recognized standards organizations to the maximum extent practicable;"

The second major section of the FY17 NDAA that directs DoD to use commercial standards whenever practicable is Section 875 "Use of Commercial or Non-Governmental Standards in Lieu of Military Specifications and Standards." That section is reproduced below in its entirety.

"(a) IN GENERAL.—The Secretary of Defense shall ensure that the Department of Defense uses commercial or non-Government specifications and standards in lieu of military specifications and standards, including for procuring new systems, major modifications, upgrades to current systems, non-developmental and commercial items, and programs in all acquisition categories, unless no practical alternative exists to meet user needs. If it is not practicable to use a commercial or non-Government standard, a Government unique specification may be used.

"(b) LIMITED USE OF MILITARY SPECIFICATIONS.—

"(1) IN GENERAL.—Military specifications shall be used in procurements only to define an exact design solution when there is no acceptable commercial or non-Government standard or when the use of a commercial or non-Government standard is not cost effective.

"(2) WAIVER.—A waiver for the use of military specifications in accordance with paragraph (1) shall be approved by either the appropriate milestone decision authority, the appropriate service acquisition executive, or the Under Secretary of Defense for Acquisition, Technology, and Logistics.

"(c) REVISION TO DFARS.—Not later than 180 days after the date of the enactment of this Act, the Under Secretary of Defense S. 2943—312 for Acquisition, Technology, and Logistics shall revise the Defense Federal Acquisition Regulation Supplement to encourage contractors to propose commercial or non-Government standards and industry-wide practices that meet the intent of the military specifications and standards.

"(d) DEVELOPMENT OF NON-GOVERNMENT STANDARDS.—The Under Secretary for Acquisition, Technology, and Logistics shall form partnerships with appropriate industry associations to develop commercial or non-Government standards for replacement of military specifications and standards where practicable.

"(e) EDUCATION, TRAINING, AND GUIDANCE.—The Under Secretary of Defense for Acquisition, Technology, and Logistics shall ensure that training, education, and guidance programs throughout the Department are revised to incorporate specifications and standards reform.

"(f) LICENSES.—The Under Secretary of Defense for Acquisition, Technology, and Logistics shall negotiate licenses for standards to be used across the Department of Defense and shall maintain an inventory of such licenses that is accessible to other Department of Defense organizations."

Finally, there are two principal models for developing standards: the consortium model and the voluntary consensus model. In the consortium model, a number of entities develop a unique set of rules for arriving at the consensus of the members. In such a model, there may be no requirement to reach out to all members of a community affected by the standard. There may be no requirement for openness or balance in representation. There may be no route of dispute resolution other than, for example, majority rule.

In the second model—the voluntary consensus model—if the standards development organization is accredited by the American National Standards Institute (ANSI), there is an explicit guarantee of openness, balance, and fairness. Any such accredited standards development organization must meet the *ANSI Essential Requirements* (https://share.ansi.org/Shared%20Documents/Standards%20Activities/American%20National%20Standards/Procedures,%20Guides,%20and%20Forms/2017_ANSI_Essential_Requirements.pdf), which have been developed and refined for the last approximately 100 years. ANSI is the principal voluntary consensus standards accrediting organization in the United States, with well over 200 accredited standards development organizations (SDOs) that meet its requirements. Examples of ANSI accredited SDOs are the following:

- American Dental Association
- Institute of Electrical and Electronics Engineers
- Institute of Industrial Engineers
- ASTM International
- Society of Automotive Engineers (SAE International)
- Telecommunications Industry Association
- Underwriters Laboratories, Inc.
- Uniform Code Council

Generally voluntary consensus standards developed by an ANSI-accredited SDO are preferred in the commercial marketplace.

Recommendation: Make changes to the DFARS that would require DoD:

1. To use voluntary consensus standards development by an ANSI-accredited SDO whenever practicable.
2. To license the use of commercial voluntary consensus standards on standard commercial terms and at standard commercial prices.

Cross-reference to other Tension Points:

-